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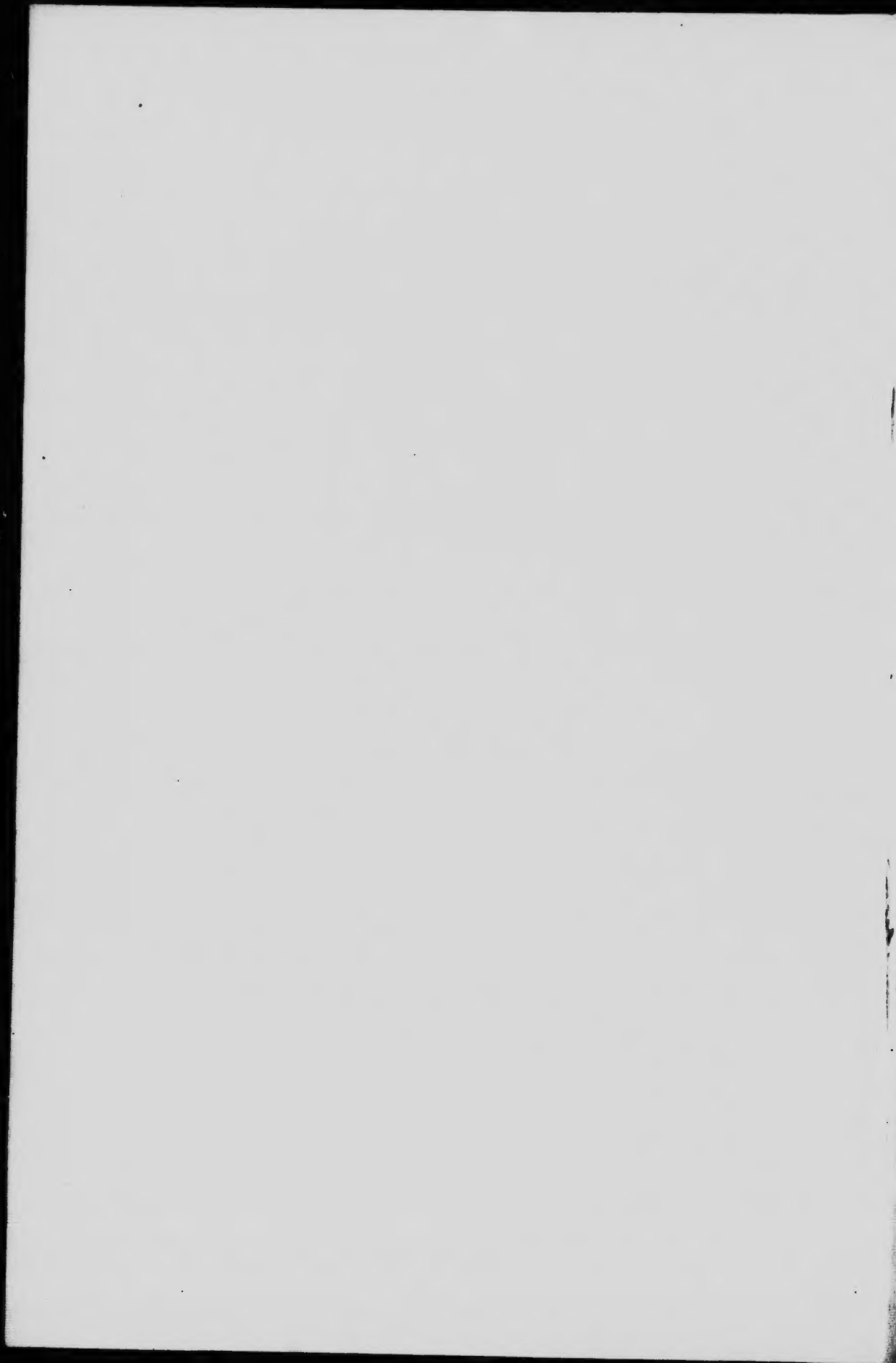
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THE LAW
RELATING TO
EXECUTORS AND ADMINISTRATORS

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WITH NOTES OF CANADIAN CASES

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PREFACE TO THE CANADIAN NOTES

The Canadian cases cited in this volume are selected from the volumes of reports published in the various Provinces of Canada, but, of course, these cases do not cover every portion of the subject.

An attempt has been made to follow, as nearly as practicable, the plan adopted by Mr. E. D. Armour, K.C., in his valuable Canadian notes to the last edition of Theobald on Wills.

The Canadian cases have been dealt with down to September, 1908.

W. B. W.

HALIFAX, October, 1908.



PREFACE.

THIS work is intended not merely as a book of easy reference, but as an attempt to express in a concise form the general principles of the law relating to executors and administrators. As a model for guidance it follows the great work of Sir Edward Vaughan Williams on that subject, to which frequent references are made. It is intended for the use of the practitioner and student, and as an introduction to the greater work, which is recognised by the Courts as an authoritative statement of the law, and where alone is to be found collected the mass of authorities showing the gradual growth of the subject. At the same time the present work contains much that is new, and the subject has been considerably rearranged. For convenience, references are made to the 10th edition (1905) of Williams on Executors, but in most instances they will be found to be in the learned author's own words taken from the early editions which he himself supervised. Whenever of late years the authorities have been reviewed and a principle re-stated by the Court, the principle so stated has been embodied in this treatise with a reference to the case, omitting earlier authorities, which can easily be ascertained when necessary from the report itself or from the larger work on the subject.

The Public Trustee Act, 1906, which came into operation on the 1st January, 1908, constituting a Public Trustee, as a

corporation sole with perpetual succession, and authorising the Public Trustee, under that name, to be appointed to and to accept the offices of executor and administrator, and vesting in him extensive administrative powers, introduces a useful innovation into the law relating to executors and administrators which may have important results. This Act, with the rules made under it, is given in full in the Appendix.

July, 1908.

A. R. I.

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THE LAW RELATING

TO

EXECUTORS AND ADMINISTRATORS.

INTRODUCTION.

THE legal personal representative of a deceased person is either the executor or person to whom the execution of a last Will and Testament of personal estate is, by the testator's appointment, confided (a), or the administrator or person deputed by the Court to administer the estate of the deceased in case of intestacy or where there is no executor or no executor willing or capable to act.

Meaning of legal personal representative.

The personal estate of the deceased vests in the executor or administrator, and in the case of deaths after the 31st of December, 1897, that is, after the commencement of the Land Transfer Act, 1897, the real estate also, except land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

Property which vests in him.

Executors and administrators differ in little else than in the manner of their constitution (b).

Difference between executor and administrator. Title.

The executor derives his title from the Will, and the property of the deceased vests in him from the moment of the testator's death (c). The probate is only evidence of the executor's right (d). An executor is a complete executor, as to every intent but bringing of actions, before probate (e).§

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| <p>(a) Toller (1822 ed.) 30.
 (b) Fonblanque on Equity (5th ed.), vol. 2, p. 378.
 (c) Woolley v. Clark, (1822) 5 B. & Ald. 744.</p> | <p>(d) Smith v. Miles, (1786) 1 T. R. at p. 490.
 (e) Wankford v. Wankford, (1698) 1 Salk. 299, 301.</p> |
|--|--|

The administrator derives his authority entirely from the appointment of the Court. He has no title until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (*f*). As a general rule a party entitled to administration cannot act before letters of administration are granted to him (*g*).

Powers.

After the administration is granted, the interest and power of the administrator is equal to and with the power and interest of the executor (*h*).

No administration of any sort can be granted when there is an executor willing and capable to act, he being *universi juris hæres* to his testator (*i*).

Duration of office.

Unless the appointment of executor is limited in point of time or for a particular purpose, it endures during his whole lifetime, and he cannot renounce or retire from the office after having once acted. The Court will, however, revoke the probate under special circumstances (*j*), and it would seem that under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), the Court can, without revoking probate, in a proper case, remove the executor and appoint a judicial trustee in his place (*k*). Moreover, under the Public Trustee Act, 1906 (6 Edw. VII. c. 55), ss. 8 and 6, after probate or grant of administration estates may be transferred to the Public Trustee for administration (*l*).

The office of administrator, unless limited for a particular time or purpose, endures during the whole lifetime of the person to whom the grant is made, and cannot be repealed unless for a just cause (*m*).

Transmissibility of office.

Inasmuch as the power of an executor is founded on the special confidence and appointment of the deceased, in the case of a single or sole surviving executor, he is allowed to transmit

(*f*) *Woolley v. Clark, ubi sup.*

(*g*) *Wankford v. Wankford, ubi sup.*

(*h*) *Sheppard's Touchstone*, 474.

(*i*) *Coswall v. Morgan*, (1757) 2 Lee 571.

(*j*) In the Estate of George Shaw, [1905] P. 92, and see *post*, p. 137.

(*k*) *Re Ratcliff*, [1898] 2 Ch. 352.

The Court could not under the Trustees Act, 1850, appoint a person to discharge duties which belonged only to the office of executor, and not to that of trustee: *Re Willey*, (1890) W. N. 1.

(*l*) See Appendix.

(*m*) See *post*, p. 139.

that power to another, in whom he has equal confidence ; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. The administrator on the other hand is merely the officer of the Court, and his power is not transmissible to his executor or administrator (*n*).

The whole jurisdiction of Courts of Equity in the administration of assets is founded on the principle that it is the duty of the Court to enforce the execution of trusts, and that the executor or administrator who has the property in his hands is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the Will, or, in case of intestacy, according to the Statutes of Distribution (*o*). An executor or administrator is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (*p*). If he accepts the office he becomes a trustee in this sense (*q*). But an executor or administrator is not an express trustee, and the mere constructive trust by implication from his office will not prevent s. 8 of the Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57), from being a bar after twelve years to a suit to recover a legacy (*r*), or s. 13 of the Act 23 & 24 Vict. c. 38 from being a bar after twenty years to a suit to recover a share of an intestate's estate (*s*).

Liability.

Not an express trustee.

Where personal property is bequeathed to the executors as trustees, the taking out probate of the Will is an acceptance by them of all the trusts (*t*). But probate or letters of administration granted to the personal representative of a sole or last surviving trustee will not constitute such personal representative trustee of the settlement or Will creating the trust, unless

Taking probate is acceptance of trust under Will.

(*n*) 2 Bl. Com. 506 ; Williams (10th ed.) 180 ; and see *post*, pp. 51, 117.

(*o*) *Adair v. Shaw*, (1803) 1 Scho. & L. 262.

(*p*) Williams (10th ed.) 1609.

(*q*) *Re Marsden*, (1884) 26 C. D. 783, 789.

(*r*) *Re Rowe*, (1889) 58 L. J. Ch. 703 ; *Re Jane Davis*, [1891] 3 Ch.

119 ; *Mackay v. Gould*, [1906] 1 Ch. 25 ; *Waddell v. Harshand*, [1905] 1 I. R. 416.

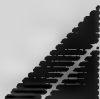
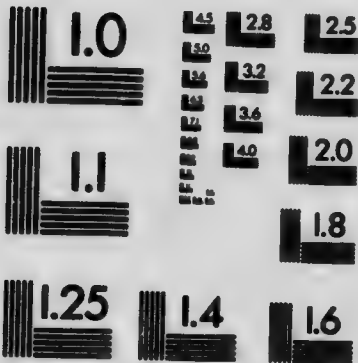
(*s*) *Re Johnson*, (1885) 29 C. D. 964 ; *Re Lacy*, [1899] 2 Ch. 149 ; *Waddell v. Harshand*, *ubi sup.*

(*t*) *Mucklow v. Fuller*, (1821) Jac. 198.



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Difficulty in determining when executor is *functus officio* and becomes trustee.

he elects to act as trustee (*u*); but having elected to act he thereby becomes trustee for all purposes (*x*).

It is a common case that the same persons are executors and trustees, and under a Will so framed it may be difficult to determine when an executor ceases to have duties *quâ* executor: is *functus officio* and becomes trustee (*y*). There is, however, no authority for holding that merely because a debt was not called in for some time, the Court must imply, even after a lapse of twenty years and interest being paid in the meantime, that the debtor knew that the executors had ceased to be executors and had become trustees so as to necessitate a joint receipt by the trustees for the time being to give the debtor a good discharge. The persons with whom the executors are dealing are not bound to know the state of the testator's assets, and there may be good reasons why the receipt of one executor should suffice, and this rule prevails until the debtor is fixed with precise notice that the estate has been all administered (*z*). So also a purchaser from an executor must assume, in the absence of evidence to the contrary, even after twenty years have elapsed, that the sale is by the executor in that capacity and in due course of administration (*a*).

The subject of trusts apart from the office of executor or administrator is not within the scope of this work.

(*) *Legg v. Mackrell*, (1860) 2 D. F. & J. 551; *Re Benett*, [1906] 1 Ch. 216.

(x) *Re Waidanis*, [1908] 1 Ch. 123.

(y) *Re Timmis*, [1902] 1 Ch. 176.

(z) See per *Ld. Hatherley*, L.C., in *Charlton v. Earl of Durham*, (1869) L. R. 4 Ch. 433, 438; and *post*, p. 478.

(a) *Re Whistler*, (1887) 35 C. D. 561, *post* pp. 209, 216.

CHAPTER I.

OF WILLS AND CODICILS.

SECT. 1.—*The general nature of and essentials to a Will or Codicil.*

INASMUCH as the executor derives his authority from the Will, the validity of the Will is the first matter for consideration.

The naming or appointing of an executor in the time of Swinburne (1590) was said to be the foundation of the testament without which a Will was no proper testament, and in *Woodward v. Lord Darcy* (a) it was laid down by the common law judges that "without an executor a Will is null and void." But this strictness has long since ceased to exist. And even by the old authorities an instrument which would have amounted to a testament, if an executor had been appointed, was recognised as obligatory on him who had the administration of the goods of the deceased under the appellation of a codicil (b).

Formerly appointment of executor was the foundation of the testament.

A codicil in the sense it is now used, as an addition to or alteration of his Will made by a testator, is part of the Will, making together one testament (c), and the language of the Will may be interpreted by that of the codicil (d).

Will and codicil make together one testament.

It will be sufficient, for the most part, for the purpose of this treatise (e), to commence with the Wills Act (1 Vict. c. 26), which repealed earlier statutes except as to Wills made before the 1st of January, 1838.

The Wills Act, 1837 (1 Vict. c. 26).

Sect. 3 of the Wills Act enables "every person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate

Sect. 3. Property which may be disposed of by Will.

(a) (1555) Plowd. 185.

683; *Re Venn*, [1904] 2 Ch. 52.

(b) See Williams (10th ed.) 5.

(c) As to the Origin of Wills, see

(c) *Ibid.*

Williams (10th ed.) 1 *et seq.*

(d) *Darley v. Martin*, (1853) 13 C. B.

which he shall be entitled to, either at law or in equity, at the time of his death." This section in its general form is qualified in certain respects by other sections which will be referred to hereafter.

Although in feudal times, at common law, there was no power to dispose by Will of real estate, and the power to dispose of personal estate was restricted so as to reserve shares for the wife and children of the testator, yet now there is no restriction to the power of disposition, and a Will is not defective and cannot be set aside as being deficient in natural duty (*f*).

Sect. 9.
Requisites to
the validity
of Will.

Sect. 9 provides "that no Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary."

Sect. 11.
Exception in
favour of
soldiers and
mariners.

Before the Wills Act and by virtue of the exception contained in s. 28 of the Statute of Frauds (29 Car. II. c. 8) any soldier being in actual military service, or any mariner or seaman, being at sea, might dispose of his moveables, wages, and personal estate by Nuncupative Will, that is by declaration before a sufficient number of witnesses without any writing, or by a Will in writing without any solemnities. Sect. 11 of the Wills Act provides "that any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the making of this Act."

It follows that the appointment of executor and the disposition of personal estate may be made—

(1) By Will executed in manner required by the Wills Act, or

(2) In the case of any soldier being in actual military

(*f*) The Wills Act, however, does not extend to Scotland, see s. 35.

service, or any mariner or seaman, being at sea, by Nuncupative Will, or by writing without any solemnities, as he might have done before the Statute of Frauds.

The words "in actual military service" do not apply to the Will of a soldier made while merely quartered in barracks either at home or in the colonies. A state of war must exist with which the soldier is, or may be, connected, and some step must have been taken by him towards joining the forces in the field (*g*).

Where a man has joined a vessel on service, and has commenced a voyage in it, his Will is within the exception in this Act, even though made on shore, or though the vessel at the time was laid up in harbour (*h*).

Sect. 11 of the Wills Act applies to merchant seamen as well as to seamen in the King's service (*i*).

A Will may be written in any language and either in ink or pencil (*k*); and, whether Will or codicil, it requires no special form of words (*l*).

Whatever may be the form of the instrument duly executed in accordance with the Wills Act, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary (*m*). This rule applies notwithstanding the instrument may take the form of a deed (*n*).

Instrument may be testamentary regardless of form.

But a document, though formally executed as a Will, will not operate as a legal Will if there was no *animus testandi*, as for instance if the document bears upon the face of it a positive assertion that it is not meant to operate as a legal Will (*o*), or it is shown in evidence that it was written in jest, or without any intention of making an operative Will (*p*).

There must be *animus testandi*.

(*g*) In the Goods of Hiscock, [1901] P. 78; and see Williams (10th ed.) 91.

(*h*) In the Goods of M'Murdo, (1867) L. R. 1 P. & D. 540, and see Williams (10th ed.) 92.

(*i*) In the Goods of Parker, (1859) 2 Sw. & Tr. 375.

(*k*) See Williams (10th ed.) 85.

(*l*) Oldroyd v. Hayley, [1907] P.

326.

(*m*) Cock v. Cooke, (1866) L. R. 1 P. & D. 241, 243; In the Goods of Coles, (1871) L. R. 2 P. & D. 362.

(*n*) In the Goods of Morgan, (1866) L. R. 1 P. & D. 214.

(*o*) Ferguson Davie v. Ferguson Davie, (1890) 15 P. D. 109.

(*p*) Williams (10th ed.) 82, n. (*o*).

Extrinsic evidence admissible to show intention. Revocability essential.

When contract to leave property by Will may be enforced specifically.

Mutual Wills.

Extrinsic evidence is admissible for the purpose of showing with what intention an ambiguous paper has been executed (*q*).

A Will is by its nature in all cases revocable, even though it is in terms expressed to be irrevocable. A Will is, therefore, said to be *ambulatory* until the death of the testator (*r*).

A contract to leave property by Will may be enforced by way of specific performance against all who claim under the deceased contractor as volunteers (*s*); but a contract to leave by Will on the part of one who was merely donee of a general testamentary power of appointment will not be specifically enforced (*t*), although damages are recoverable for the breach thereof (*u*); and such a contract on the part of the donee of a special testamentary power is void, and no remedy could be had upon it (*x*).

Where two persons have made an arrangement as to the disposal of their property, and executed mutual Wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his Will, his personal representative takes the property upon trust, to perform the contract, for the Will of the one who has died first has, by the death, become irrevocable. But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh Will, revoking the former one, the survivor, who has on the death of the other party to the arrangement notice of the alteration, cannot claim to have the later Will of the deceased set aside or modified, either by way of declaration of trust or otherwise (*y*). Nor, it would seem, could the Will of the survivor, whether he had notice or not of the alteration, be treated as impliedly revoked (*z*); so

(*q*) In the Goods of Slinn, (1890) 15 P. D. 156.

(*r*) Williams (10th ed.) 7, 94.

(*s*) Synge v. Synge, [1894] 1 Q. B. 466, 470, and see Fry on Specific Performance, 4th ed., s. 245.

(*t*) Re Parkin, [1892] 3 Ch. 510, 517; Re Lawley, [1902] 2 Ch. 799;

[1903] A. C. 411.

(*u*) Re Parkin, *ubi sup.*

(*x*) Palmer v. Locke, (1880) 15 C. D. 294, 301, per Brett, L.J.; Re Bradshaw, [1902] 1 Ch. 436.

(*y*) Stone v. Hoskins, [1905] P. 194, and see Williams (10th ed.) 7.

(*z*) See s. 19 of Wills Act, *post*, p. 28.

marriage will revoke the Will of one testator without impliedly revoking the Will of the other (a).

The form of the Will being conjoint, that is, being made by two testators in one and the same instrument, cannot alter its revocable nature (b). On the first death of one of the testators, probate will be granted of so much of the instrument as then becomes operative (c).

Conjoint
Wills in one
instrument.

Although a testator may by Will delegate to another the power to select from a class and even to nominate executors (d), yet he cannot give someone else power to make a Will for him instead of making a Will for himself, and it is on this principle that vague directions are frequently held to be void for uncertainty (e).

Power to
make a Will
cannot be
delegated;

And s. 20 of the Wills Act prevents a testator delegating his power to revoke his Will by inserting in it a clause conferring on another an authority to cancel or destroy it after his death (f).

nor power to
revoke a
Will.

A testator cannot prospectively make a Will by reference to a paper to come into existence at a future time (g). Where a Will refers to a paper, such paper cannot be incorporated in it unless it is clearly identified with the description of it given in the Will, and is shown to have been in existence at the time the Will was executed (h). The confirmation of a Will by codicil, making it speak from the date of the codicil, will incorporate into the Will an informal document referred to in the Will as existing, although it came into existence only after the execution of the Will, but before the execution of the codicil; but if the Will, treated as being re-executed by the codicil, still speaks in terms which

Testator
cannot pro-
spectively
make a Will
by reference
to papers to
come into
existence.

(a) *Hinckley v. Simmens*, (1798) 4 Ves. 160.

(b) See Williams (10th ed.) 7.

(c) In the Goods of *Piazzi-Smyth*, [1898] P. 7.

(d) Williams (10th ed.) 171.

(e) *Grimond (or Macintyre) v. Grimond*, [1905] A. C. 124.

(f) *Stockwell v. Ritherdon*, (1848) Robert. 661.

(g) *Croker v. Marquis of Hertford*, (1844) 4 Moo. P. C. 339; In the Goods of *Adamson*, (1875) L. R. 3 P. & D. 253, 255; and cf. *Re Boyes*, (1884) 26 C. D. 531, and *post*, p. 83, as to secret trusts.

(h) *Singleton v. Tomlinson*, (1878) 3 App. Cas. 404; *University College of North Wales and University of Wales v. Taylor*, [1907] P. 228, [1908] P. 140.

show that it is referring to a future document, then there is no incorporation (i).

In order to admit parol evidence for the purpose of identifying a document referred to in a Will and intended to be incorporated, the description of the document in the Will must definitely refer to an existing document. If the Will can be construed as referring to an existing or future document, parol evidence is not admissible (k).

SECT. 2.—*Of persons incapacitated to make a Will.*

Sect. 7 of Wills Act, 1837, invalidates Will of infant.

Sect. 11 excepts infant soldier or seaman under certain circumstances.

Sect. 8, as to capacity of married woman.

Effect of husband's assent.

Infants.—Prior to the Wills Act, an infant, if adjudged competent, might make a valid Will of personal estate, a male at fourteen, a female at twelve years of age, but not at an earlier period (l). Sect. 7 of the Wills Act provides "that no Will made by any person under the age of twenty-one years shall be valid." But s. 11 of the same Act provides "that any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the making of this Act." A Will therefore made since the Act by an infant soldier "in actual military service" (m), or by an infant seaman "being at sea" (n), is valid.

Married women.—Sect. 8 of the Will^r Act provides "that no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act."

At the passing of the Wills Act a married woman could dispose of property, real or personal, given or settled to her separate use, or over which she had been given a right to make a Will under a power of appointment; otherwise she had no power whatever to devise land; but as to personal property the husband surviving could waive his right to administration so as to give effect to a Will made by his wife during the

(i) In the Goods of Smart, [1902] P. 238, 241.

(k) University College of North Wales and University of Wales v. Taylor, *ubi sup.*; (C. A.) [1908] P. 140.

(l) Williams (10th ed.) 12.

(m) In the Goods of Hiscock, [1901] P. 78.

(n) *Re* McMurdo, (1867) L. R. 1 P. & D. 540.

coverture in derogation of his marital right (o). Such assent by the husband to his wife's Will of personalty might be given either during her life or after her death, but if he died before his wife the Will was void against her next-of-kin so far as it derived its effect from his assent. Moreover, the husband might revoke his consent at any time before probate, unless after her death he acted upon the Will or agreed to it (p).

A Will made during coverture could not pass property acquired by the wife after her husband's death, or property acquired for her separate use after the date of her Will, for at the time of making the Will she was intestable as to such property; and formerly where a Will was made by a married woman under a power, as the title of her executor did not extend beyond the property the subject of the power, the probate was limited accordingly (q).

Property which could not pass under Will of married woman.

Since the husband had no beneficial interest in the personal estate which the wife took in the character of executrix, and as the law permitted her to take upon herself that office, it enabled her, even before the Married Women's Property Act, 1882, if sole executrix, to make a Will in this instance, without the consent of her husband; restricted, however, to what she was entitled to as executrix (r).

Married woman sole executrix could transmit interest.

By s. 21 of 20 & 21 Vict. c. 85, after a protection order, the wife shall, during the continuance thereof, be and be deemed to have been during the desertion in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under the Act if she obtained a decree of judicial separation (s).

Effect of protection order.

Sect. 25 of the same Act provides that as to property acquired by the wife from the date of the sentence of judicial separation, and whilst the separation shall continue, such property may be disposed of by her in all respects as a *feme*

Effect of judicial separation.

(o) Noble v. Willock, (1873) L. R. 8 Ch. 778, 789.

(p) See Elliot v. North, [1901] 1 Ch. 424, and Williams (10th ed.) 40.

(q) Williams (10th ed.) 46.

(r) Williams (10th ed.) 40.

(s) The Will of a married woman

who has obtained a protection order is valid, although the order may not have been registered within ten days as provided by the above section. In the Goods of Farraday, (1862) 2 Sw. & Tr. 369.

sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead.

21 & 22 Vict.
c. 108, s. 7.

By s. 7 of 21 & 22 Vict. c. 108, the above provisions respecting the property of a wife who has obtained a decree for judicial separation or an order for protection were extended to property to which such wife had become or should become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case might be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Effect of
the Married
Women's Pro-
perty Acts :
33 & 34 Vict.
c. 93.
45 & 46 Vict.
c. 75.

The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), extended the testamentary capacity of married women by declaring certain property referred to in the Act to be her separate property. But the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), confers expressly testamentary powers on married women.

Sect. 1 (1).

Sect. 1 (sub-s. 1) : "A married woman shall in accordance with the provisions of this Act"—(i.e., in accordance with ss. 2 and 5 (t))—"be capable of acquiring, holding, and disposing by Will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Sect. 2, as to
woman mar-
ried after
1st January,
1883.

Sect. 2 : "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic or scientific skill."

Sect. 5, as to
woman mar-
ried before

Sect. 5 : "Every woman married before the commencement of this Act shall be entitled to have and to hold and to

(t) *Re Cune*, (1889) 43 C. D. 12,

dispose of in manner aforesaid all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid." 1st January, 1883.

Sect. 28: "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Sect. 3 of the amending Act of 1898 (56 & 57 Vict. c. 63) provides that "Sect. 24 of the Wills Act, 1837" (by which a Will shall be construed to speak from the death of the testator) "shall apply to the Will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such Will shall not require to be re-executed or republished after the death of her husband." 56 & 57 Vict. c. 63, s. 3, extends operation of Will of married woman to after-acquired property.

Seamen or marines of His Majesty's naval or marine force as defined by s. 2 of the statute 28 & 29 Vict. c. 72 are protected against certain testamentary acts. The proper result to be deduced from the cases on construction of the Acts is that when the relation of agent and seaman exists, there must be clear proof not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that wherever it is executed merely as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by Will, the instrument shall be valid (u). Seamen and marines protected against improvident testamentary dispositions.

Merchant seamen.—As regards merchant seamen, the Merchant Shipping Act, 1894, s. 177, provides as follows:— Merchant seamen protected against improvident testamentary dispositions.

"(1) Where a deceased seaman or apprentice has left a Will, the Board of Trade may refuse to pay or deliver the above-

(u) Per Sir John Nicholl in *Zacharias v. Collis*, (1820) 3 Phillim. 202, and see Williams (10th ed.) 37.

mentioned residue" [that is, the seaman's property after deducting expenses] :

" (a) If the Will was made on board ship, to any person claiming under the Will, unless the Will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship, and

" (b) If the Will was not made on board ship, to any person claiming under the Will, and not being related to the testator by blood or marriage, unless the Will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, two witnesses, one of whom is a superintendent, or is a minister of religion officiating in the place in which the Will is made, or, where there are no such persons, a justice, British consular officer, or an officer of customs.

" (2) Whenever the Board of Trade refuse under this section to pay or deliver the residue to a person claiming under a Will the residue shall be dealt with as if no Will had been made."

Sect. 173 regulates the rights of creditors of deceased seamen and apprentices, claiming from the Board of Trade.

Sect. 742 defines the term "seaman" to include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.

The equity of these statutes cannot be extended beyond the Wills of mariners, so as to invalidate the Wills of other persons given to secure debts (x).

Idiot.

An idiot, that is, a fool or madman from his nativity who never has any lucid intervals, is incapable of making a Will (y).

Lunatic.

A lunatic, that is, a person usually mad, but having intervals of reason, during the time of his insanity cannot make a testament, nor dispose of anything by Will. But a

(x) Williams (10th ed.) 38; *Florance v. Florance*, (1755) 2 Lee 87.

(y) Williams (10th ed.) 12.

Will is not revoked by the subsequent insanity of the testator (z).

Sanity will be presumed till the contrary is shown, but it is an inference merely from the absence of evidence to show the contrary. If a Will is produced before a jury and its execution proved, and no other evidence is offered, the jury would be properly told that they ought to find for the Will. And if the party opposing the Will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the Will. And in each case the presumption of competency would prevail. Still, the *onus probandi* lies, in every case, on the party relying on a Will, and he must satisfy the jury that it is the Will of a capable testator. And when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the Will is the Will of a competent testator, they ought not to affirm by their verdict that it is so (a). During a lucid interval a person afflicted with habitual insanity may make a valid Will, notwithstanding he has been found lunatic by inquisition (b), but the presumption and *onus* of proof are inverted, for the person who would take advantage of an interval of reason must prove it (c).

Sanity presumed,
1.

but *onus probandi*
on party
relying on
Will.

Will made
during lucid
interval,
presumption
and *onus* of
proof in-
verted.

Where a Will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the Will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character, broadly taken, of his act (d).

The probabilities, *a priori*, in favour of a lucid interval are infinitely stronger in a case of delirium than in one of permanent proper insanity (e).

Distinction
between
delirium and
insanity in
proof of
lucid interval.

(z) Williams (10th ed.) 14.

(a) Williams (10th ed.) 15.

(b) Williams (10th ed.) 25, and see *Re Walker*, [1905] 1 Ch. 160, 170, showing distinction between the execution of a deed and of a Will in this respect.

(c) *Cartwright v. Cartwright*, (1793) 1 Phillim. 100; Williams (10th ed.) 16.

(d) Per Sir John Nicholl in *Scraby v. Fordham*, (1822) 1 Add. 90, and see Williams (10th ed.) 18 *et seq.*

(e) Williams (10th ed.) 21.

Partial
insanity.

Partial insanity, that is insanity upon a particular subject or as to a particular person, will invalidate a Will fairly presumable to have been made under its operation. But partial unsoundness, not affecting the general faculties, and not operating on the mind of the testator in regard to his testamentary disposition, is not sufficient to render him incapable of disposing of his property by Will (*f*).

Nature of
evidence to
prove partial
insanity.

To prove insanity as to a particular person, no course of harsh treatment—no sudden bursts of violence—no display of unkind or even unnatural feeling, merely, can avail; it can only be proved by making out a case of antipathy clearly resolvable into mental perversion (*g*).

"If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a Will made under such circumstances ought not to stand" (*h*).

Where partial insanity is established the Will itself is null and void, and not merely a particular disposition (*i*).

It affects
whole Will
and not
merely
particular
disposition.

Infirmity as
distinguished
from insanity.

Unsoundness of mind arising from want of intelligence occasioned by defective organisation, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, is equally a cause of incapacity. The inquiry in such cases simply is, whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done (*k*).

(*f*) *Banks v. Goodfellow*, (1870) L. R. 5 Q. B. 549, where Cockburn, C.J., in delivering the judgment of the Court, reviewed the earlier authorities; *Boughton v. Knight*, (1873) L. R. 3 P. & D. 64; *Smee v. Smee*, (1879) 5 P. D. 84; and *Jenkins v. Morris*, (1880) 14 C. D. 674.

(*g*) *Dew v. Clark*, (1822) 1 Add. 279;

(1826) 3 Add. 79; *Boughton v. Knight*, *ubi sup.*

(*h*) Per Cockburn, C.J., in *Banks v. Goodfellow*, L. R. 5 Q. B. at p. 565.

(*i*) Cases above cited, and see also *Smith v. Tebbitt*, (1867) L. R. 1 P. & D. 398, 435.

(*k*) *Banks v. Goodfellow*, *ubi sup.* at p. 566.

The standard of capacity in cases of impaired mental power would seem to be the capacity on the part of the testator to comprehend the extent of his property, and the nature of the claims of others whom by his Will he is excluding from all participation in that property (l).

Standard of capacity in cases of infirmity.

Mere weakness of understanding is no objection to a man disposing of his property by Will, for Courts cannot measure the size of people's understandings and capacities, nor examine into the wisdom or prudence of men disposing of their estates (m).

Mere weakness of understanding.

One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making a Will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means and has a desire to make one, then he may by signs and tokens declare his testament. One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then, in case he shall be able to write, he may with his own hand write his last Will and testament. But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, i.e., if he have understanding he may make his testament by signs, otherwise not at all. Such as can speak and cannot hear, they may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise. Such as be speechless only, and not void of hearing, if they can write, may very well make their testaments themselves by writing; if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present (n).

Deaf and dumb.

As to blind persons it must be proved either that the Will was read over to the testator or that he was otherwise acquainted with its contents before he executed it (o).

Blind persons.

(l) Harwood v. Baker, (1840) 3 Moo. P. C. C. 282, 290; Banks v. Goodfellow, *ubi sup.* at p. 569.

(m) Williams (10th ed.) 27.

(n) Williams (10th ed.) 12, 13.

(o) Fincham v. Edwards, (1842) 3 Curt. 63, on app. 4 Moo. P. C. 198.

Illiterate persons.

Similar evidence is necessary in the case of a person who cannot read as in the case of a blind person. There is no presumption that a person who executes a Will knows and approves of the contents thereof where by defect of education or by reason of illness he cannot read the Will (p).

Person drunk.

Person drunk—"which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case" (q).

Duress.

Duress (r). It is for the Court to judge upon the consideration of the particular circumstances whether or not the testator could be supposed to have *liberum animus testandi* (s). It may arise either from force (t) or fear, but the fear must be such as that without it the testator had not made his testament at all, at least not in that manner (u).

Fraud.

Fraud and imposition upon weakness are sufficient grounds to set aside a Will (x).

The Court may admit a part of an instrument to probate and refuse it as to the rest; as where a Will is void as to part obtained by undue influence or fraud, and good as to the rest (y).

Importunity.

Importunity, in order to invalidate the instrument, must be in such a degree as to take away from the testator free agency: so that the act is not the free act of a capable testator (z).

Influence.

Influence to invalidate a Will must be such a dominion acquired over the testator as to prevent the exercise of his discretion. It must amount to force and coercion destroying free agency. It must not be the influence

(p) Williams (10th ed.) 14.

(q) Swinburne, Pt. 2, s. 6.

(r) See Williams (10th ed.) 29 *et seq.*

(s) 2 Bl. Com. 497.

(t) Mountain v. Bennett, (1788) 1 Cox 355.

(u) Godolph., Pt. 3, c. 25, s. 8.

(x) Williams (10th ed.) 30.

(y) Trimleston v. D'Alton, (1827) 1 Dow. & Cl. 85; Allen v. McPherson, (1847) 1 H. L. C. 191, 209.

(z) Williams (10th ed.) 31.

of affection or attachment. It must not be the mere desire of gratifying the wishes of another. It is not unlawful for a man by honest intercession and persuasion or by fair and flattering speeches to procure a Will in favour of himself or another person (a). Influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a Will, must be an influence exercised either by coercion or fraud. It is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his Will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a Will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any Will executed under false impressions thus kept alive. It is, however, difficult to state in the abstract what acts will constitute undue influence in questions of this nature (b). The undue influence must be an influence exercised in relation to the Will itself, but this may be inferred by the jury from circumstances relating to other matters or transactions (c).

The mere proof of the existence of the relation of parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, tutor and

(a) See Williams (10th ed.) 29, 30; also Parfitt v. Lawless, (1872) L. R. 2 P. & D. 462, 470.

(b) See per Ld. Cranworth in Boyse

v. Rossborough, (1856) 6 H. L. C. 6, approved in Baudains v. Richardson, [1906] A. C. 169.

(c) *Ibid.*

pupil, does not raise a presumption of undue influence to vitiate a gift by Will (d).

Will written
or prepared
by person in
his own
favour.

With regard to a Will written or prepared by a party in his own favour. Such cases are decided by the rules laid down in *Barry v. Butlin* (e). "These rules are two; the first is, that the *onus probandi* lies upon the party propounding a Will, who must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator; the second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased."

"The strict meaning of the term '*onus probandi*' is this: that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him in all cases; this *onus* is imposed on the party propounding a Will; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed; and it cannot be, that the simple fact of the party who prepared the Will being himself a legatee is, in every case and under all circumstances, to create a contrary presumption; and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove knowledge of its contents by the deceased."

Where the person making the Will in his own favour is the agent and attorney of the testator the suspicion is increased, and the conduct of a professional man in allowing the testator to remain in ignorance whereby he influenced the Will in favour of himself has been held fraudulent (f).

(d) *Parfitt v. Lawless*, (1872) L. R. 2 P. & D. 462.

(e) (1838) 2 Moo. P. C. 480, and see *Darling v. Loveland*, (1839) 2 Curt.

225, 227; *Williams* (10th ed.) 86.

(f) *Williams* (10th ed.) 86, n. (x) and cases cited.

The rule in *Barry v. Butlin* extends to all cases where circumstances exist which excite the suspicion of the Court (g).

Undue influence, in the case of a gift by Will, must be proved affirmatively (h), and a plea of undue influence ought not to be put forward unless the party who pleads it has reasonable grounds upon which to support it (i).

Traitors and felons forfeited to the King their goods and chattels on conviction. Lands were forfeited upon attainder, which took place only on judgment of death or outlawry. There was no personal incapacity to make a Will in such cases, but the incapacity was occasioned by having no property to dispose of by reason of the forfeiture. If a man had goods as executor to another the same were not forfeited by conviction, and as to such goods he might make a Will (k).

Traitors and felons.

So also a *felo de se* had testamentary capacity, although he could not dispose by Will of goods and chattels, for they were forfeited by the act and manner of his death, but he might make a devise of his lands, for they were not subjected to any forfeiture (l).

Felo de se.

Forfeiture or escheat for treason, felony, or *felo de se* was abolished by stat. 33 & 34 Vict. c. 23. Sect. 1 of this Act provided, however, that nothing in the Act should affect the law of forfeiture consequent upon outlawry; but outlawry in any civil proceeding was abolished by 42 & 43 Vict. c. 59, s. 3.

Act to abolish forfeitures for treason and felony.

Outlawry.

Proceedings in outlawry in criminal matters are exceedingly rare, and may almost be said to be extinct, but judgment of outlawry in treason or felony amounts to a conviction and attainder for the offence (m), and outlawry in misdemeanour subjects the party to forfeiture of goods and chattels and all the profits of his real estate. The outlaw may, however, make a Will and appoint executors who may obtain a reversal of the outlawry if defective (n).

(g) *Tyrrell v. Painton*, [1894] P. 151, 157 (C. A.).

(h) *Parfitt v. Lawless, ubi sup.*

(i) *Spiers v. English*, [1907] P. 122, 124.

(k) *Williams* (10th ed.) 51.

(l) *Ibid.*

(m) *Archbold's Crim. Plead.* (23rd ed.) (1905) 110.

(n) *Chit. Cr. Law*, (1826) vol. 1, p. 365.

SECT. 8.—*Of the Signature of the Testator.*

Sect. 9 of the Wills Act provides that the Will "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction."

What is
sufficient
signature.

The following are instances of sufficient signature.

(1) The making of a mark by the testator, although the name of the testator does not appear on the face of the instrument (*o*), or the testator is wrongly named in it (*p*), or the name against the mark is incorrectly stated (*q*), provided the identity is established.

(2) Stamping the Will, by way of signature, with an instrument on which the testator had had his usual signature engraved (*r*).

(8) Affixing to a Will a seal stamped with the testator's initials, who placed his finger on the impression made by the seal and said "this is my hand and seal" (*s*); but the mere putting of a seal by the testator is not sufficient (*t*).

(4) An assumed name, since it may be regarded as the mark of the testator (*u*).

(5) Signature of the testator's name by an attesting witness by the direction of the testator (*x*), or where the drawer of the Will signed in his own name and not in that of the testator (*y*); but the testator must, by act or word, in some way indicate to the two witnesses present that the signature was put there at his request (*z*).

It is not necessary that all the papers of which a Will consists should be signed by the deceased, or connected together. Where a Will is found written on several sheets and the last only is signed and attested, although the witnesses

Sheets or
papers of
which Will
consists need
not be con-
nected or all
signed, but
must all be
in room at
time of exe-
cution.

(*o*) In the Goods of Bryce, (1839) 2 Curt. 325.

(*p*) In the Goods of Douce, (1862) 2 Sw. & Tr. 593.

(*q*) In the Goods of Clarke, (1858) 1 Sw. & Tr. 22.

(*r*) Jenkins v. Gaisford, (1863) 3 Sw. & Tr. 93.

(*s*) In the Goods of Emerson, (1882) 9 L. R. Ir. 443.

(*t*) Williams (10th ed.) 56.

(*u*) In the Goods of Redding, (1850) 2 Robert. 339.

(*x*) In the Goods of Bailey, (1838) 1 Curt. 914; Smith v. Harris, (1845) 1 Robert. 262.

(*y*) In the Goods of Clark (1839) 2 Curt. 329.

(*z*) In the Goods of Marshall, (1866) 13 L. T. 643.

did not observe the others, the *prima facie* presumption is that they were in the room, and formed part of the Will at the time of the execution (a). It would seem, however, that the several sheets should be found together at the testator's death (b).

Sect. 1 of the Wills Act Amendment Act, 1852 (15 Vict. c. 24), provides "that every Will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the Will that it shall be apparent on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will, and that no such Will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the Will, or by the circumstance that a blank space shall intervene between the concluding word of the Will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the Will whereon no clause or paragraph or disposing part of the Will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the Will is written to contain the signature: and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction

Position of
signature.

(a) Gregory v. Queen's Proctor, Tr. 528; Rees v. Rees, (1873) L. R. 3 (1846) 4 N. C. 620.

(b) Marsh v. Marsh, (1860) 1 Sw. &

P. & D. 84.

which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made" (c).

Where from the obvious sequence and sense of the context it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate (d).

In *Re Madden* (e), the Court, on the evidence, being of opinion that the sheet containing the signature and attestation clause was originally written last, and had been inadvertently misplaced, as found connected after the testator's death, granted probate on that footing.

Questions may still arise where the testator's signature is placed among the words of the testimonium clause, or the clause of attestation, without otherwise subscribing the Will, whether he intended it or not for his signature to the Will (f).

SECT. 4.—Of the Attestation of Wills.

The signature "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary."

Whether the signature is made by the testator or by another for him, if it is acknowledged by the testator in the presence of two witnesses, the execution is good (g).

The witnesses must at the time of acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such is not the case it is immaterial that the signature is, in fact, there at the time of attestation or what the testator said (h).

(c) Numerous decisions on this section are referred to in the notes in Williams (10th ed.) 57 *et seq.*

(d) In the Goods of Kimpton, (1864) 3 Sw. & Tr. 427.

(e) [1905] 2 I. R. 614.

(f) See Williams (10th ed.) 58, n. (r), and cases cited.

(g) In the Goods of Regan, (1838) 1 Curt. 908.

(h) In the Goods of Gunstan, (1882) 7 P. D. 102.

Acknowledgment of signature sufficient.

Signature must be visible to witnesses.

The production of the Will with the testator's signature visibly apparent on the face on it, and a request by the testator to the witnesses to subscribe it, is sufficient acknowledgment by the testator of his signature (i).

The testator need not inform the witnesses of the nature of the instrument they are attesting, and even if he deceives them and leads them to believe it is a deed, and not a Will, the execution is good notwithstanding (k).

Witnesses need not be informed of nature of instrument.

The testator's signature must be made or acknowledged to the witnesses when both are actually present at the same time, and they must each also be conscious of the act; since a person might be present in the room at the time without knowing, or having opportunity of seeing, what was going on (l).

Both witnesses must be present at same time:

They must attest and subscribe after the testator's signature has been made and acknowledged to them (m).

must attest in presence of testator:

They must subscribe their names in the presence of the testator, but not necessarily in the presence of each other (n).

need not attest in presence of each other.

It is not requisite that the testator should actually see the witnesses sign, or be in the same room. The test is whether the testator might have seen them if he had chosen to look, not whether he did see them sign (o).

Testator must be in position to see attesting, if he chose.

If the testator was blind, it must appear that had he had his eyesight he could have seen the witnesses sign (p).

So blind testator had he eyesight.

Where a Will appears to be duly executed, and there is a complete attestation clause, the presumption *omnia rite esse acta* applies, and where the attestation clause is incomplete, the presumption also applies, but with less force (q).

Presumption *omnia rite esse acta*.

Affirmative proof of the due execution of the Will is not

(i) Williams (10th ed.) 65. For cases where the acknowledgment was held to be sufficient, see Williams (10th ed.) 66, n. (u), and where insufficient see Williams (10th ed.) 66, n. (o).

(k) Williams (10th ed.) 67.

(l) Brown v. Skirrow, [1902] P. 3.

(m) Moore v. King, (1842) 3 Curt. 243, 253; Wyatt v. Berry, [1893] P. 5.

(n) Williams (10th ed.) 68, and see

per Gorell Barnes, J., in Brown v. Skirrow, *ubi sup.*, at p. 5.

(o) In the Goods of Trimmell, (1865) 11 Jur. N. S. 248; Carter v. Seaton, (1901) 85 L. T. 76.

(p) In the Goods of Piercy, (1845) 1 Robert. 278.

(q) Vinnicombe v. Butler, (1864) 3 Sw. & Tr. 580.

To rebut
presumption
evidence must
be clear.

absolutely necessary, nor is it absolutely necessary, under all circumstances, that the witnesses should concur in stating what took place (*r*). The presumption will not be rebutted by the evidence of witnesses whose recollection of what took place is evidently defective or imperfect (*s*). And even where both the attesting witnesses profess to remember the transaction, and state facts which show that the Will was not duly executed, the Court may come to a conclusion from the facts and circumstances that their memory fails them; and so the Will may be admitted to probate notwithstanding their testimony (*t*).

What is
sufficient
subscription.

To make a valid subscription and attestation to a Will there must be either the name of the witness or some mark intended to represent it (*u*).

One witness may guide the hand of the other (*x*), but one witness cannot subscribe for the other (*y*).

A witness need not sign his own name if the name actually subscribed by him be intended to represent his name, as where John Edmunds, clerk of the testator, by mistake subscribed "John Clerk, his clerk" (*z*). But there must be an intention to subscribe the Will by the witness, and a subscription by a witness with the name of her husband (*a*), or by an imperfect signature, as by a Christian name only where the witness failing from infirmity to complete the signature abandoned the attempt (*b*), has been held insufficient. Where, however, a witness subscribed "servant to Mr. Sperling," without any name, it was held to be sufficient (*c*).

Subscription by mark is sufficient notwithstanding the

(*r*) *Blake v. Knight*, (1842) 3 Curt. 547, 561.

(*s*) *Vinnicombe v. Butler*, *ubi sup.*; *Wright v. Sanderson*, (1884) 9 P. D. 149; *Woodhouse v. Balfour*, (1887) 13 P. D. 2; *Daintree v. Fasulo*, (1888) 13 P. D. 67, 102.

(*t*) *Williams* (10th ed.) 80, and cases cited.

(*) *Hindmarsh v. Charlton*, (1861) 8 H. of L. 160.

(*x*) *Harrison v. Elvin*, (1842) 3 Q. B.

117.

(*y*) *In the Goods of White*, (1843) 2 N. C. 461.

(*z*) *Re Oliver*, (1854) 2 Spinks's Eccl. & Adm. 57.

(*a*) *In the Goods of Leverington*, (1886) 11 P. D. 80.

(*b*) *In the Goods of Maddock*, (1874) L. R. 3 P. & D. 169.

(*c*) *In the Goods of Sperling*, (1863) 3 Sw. & Tr. 272.

witness may be able to write (*d*), and so a witness may subscribe by initials (*e*).

The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting (*f*).

Position of
attestation.

The attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet (*g*), and the pieces of paper must be held or fastened together when the testator acknowledges in the presence of the witnesses his signature to the document as his Will (*h*).

If a Will is written on several or even separate sheets and the last alone is attested the whole Will is well executed provided the whole is in the room, and although a part may not have been seen by the witnesses. It may be presumed when the witnesses only saw the last sheet of the Will that the whole was in the room (*i*).

SECT. 5.—Of Revocation of Wills.

Sect. 18 of the Wills Act provides that "every Will made by a man or woman shall be revoked by his or her marriage (except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions)."

1 Vict. c. 26,
s. 18, by
marriage.

An invalid marriage, as for instance formerly a marriage with a deceased wife's sister, has not the effect of revoking a Will (*k*).

A Will disposing of a man's property generally and also exercising a power of appointment may be held good as to that

(*d*) Williams (10th ed.) 70.

(*e*) In the Goods of Christian, (1849) 2 Robert. 110; In the Goods of Blewitt, (1880) 5 P. D. 116.

(*f*) In the Goods of Braddock, (1876) 1 P. D. 433; In the Goods of Fuller, [1892] P. 377.

(*g*) In the Goods of Braddock, *ubi*

sup.; In the Goods of Hatton, (1881) 6 P. D. 204.

(*h*) Lewis v. Lewis, [1908] P. 1.

(*i*) Bond v. Seawell, (1765) 3 Burr. 1773; Williams (10th ed.) 73.

(*k*) Mette v. Mette, (1859) 1 Sw. & Tr. 416.

part which exercises the power as being within the proviso although revoked as to the rest by the marriage of the testator (*l*).

Effect of marriage on Will made in exercise of a power.

Under this section a Will made in exercise of a power is only revoked by marriage when the property would pass in default of appointment to the heir, etc., of the testator as such either under the express wording of the limitation or trust in default of appointment contained in the settlement creating the power or under a resulting trust. Consequently marriage does not revoke a Will made in exercise of a power where the limitation or trust in default of appointment is not in express words to the appointor's heir, etc., notwithstanding that the persons who would take under the settlement in default of appointment are the same persons as would have taken the appointor's own property had he died intestate and in the same proportions (*m*).

So where the settlement under which the power is given provided that in default of appointment the trust fund should go to the person or persons who at the decease of the donee of the power should be his next-of-kin, a Will made in exercise of the power is not revoked by subsequent marriage, since the words next-of-kin, taken alone, do not imply the same class as the words next-of-kin under the Statute of Distributions (*n*).

Sect. 19 provides that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

Sect. 19. No revocation by presumption of intention arising from alteration in circumstances.

Before the Wills Act the marriage of a testator did not without birth of issue work an implied revocation, but if a woman made a Will and afterwards married, the marriage alone was a revocation of her Will (*o*).

Sect. 20 provides that "no Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [*i.e.*, by

Sect. 20. By subsequent Will, or writing executed like a Will, or destruction.

(*l*) In the Goods of Russell, (1890) 15 P. D. 111.

(*m*) In the Goods of Fitzroy, (1858) 1 Sw. & Tr. 133; In the Goods of Fenwick, (1867) 1 P. & D. 319.

(*n*) In the Goods of McVicar, (1869)

L. R. 1 P. & D. 671.

(*o*) As to implied revocations of Wills before the Wills Act, see Williams (10th ed.) 7, and earlier editions, Pt. I., Bk. II., Ch. III., s. 5.

marriage under s. 18], or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Sect. 21 provides that "no obliteration, interlineation, or other alteration made in any Will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will: but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

Sect. 21.
Alterations in Will must be executed as a Will.

It is not necessary to operate a revocation that the whole instrument should be destroyed; it is sufficient if the entirety or essence of the thing is destroyed, as for instance the excision or obliteration or scratching out as with a knife of the name of the testator, as being an essential part of the Will (p). So by parity of reasoning if the names of the attesting witnesses were taken away by the testator *animus revocandi*, it would be a good destruction of the Will under the Act (q).

What amounts to destruction.

Destruction of testator's signature.

Destruction of names of attesting witnesses.

Under s. 20 cutting is equivalent to tearing (r).

Cutting.

Cancellation by striking through with a pen is not a revocation under s. 20 of the Act, even though the striking through be done with the intention of revoking (s).

Cancellation by striking through, insufficient.

A symbolical burning, tearing, or destruction will not do;

Symbolical, insufficient.

(p) *Hobbs v. Knight*, (1836) 1 Curt. 768; In the Goods of Morton, (1887) 12 P. D. 141.

(r) *Clarke v. Scripps*, (1852) 2 Rob. 563.

(q) *Hobbs v. Knight*, *ubi sup.*

(s) *Cheese v. Lovejoy*, (1877) 2 P. D. 251.

there must be the act as well as the intention. All the destroying in the world without intention will not revoke a Will; nor all the intention in the world without destroying: there must be the two (*t*).

Inchoate
act of
destruction,
insufficient.

If the act of destruction or cancellation be inchoate and incomplete it will not amount to a revocation (*u*). In *Doe v. Perkes* (*x*), the testator having torn the Will twice through, but before he had completed his purpose his arms were arrested by a bystander and he relented, the jury found that he had not done all he intended, and that he was prevented from completing the act of destruction, and the Court held there was no revocation of the Will.

There must
be both
animus
revocandi
and the act.

There must be the *animus* as well as the act; both must concur in order to constitute a legal revocation (*y*). But there cannot be an intention to revoke what the testator believed was not a valid Will, and therefore the act of tearing a Will under the false impression that it was invalid was held ineffectual as a revocation (*z*). So where the testator imagined that the revocation had been already accomplished by a subsequent Will which was afterwards pronounced against, the act of tearing the first Will was held not to be a revocation, because the act of revocation had already been accomplished, and the act of destruction was not for the purpose of accomplishing it (*a*). And it would seem that the subsequent ratification by a testator of an unauthorised act of destruction effected in his presence by another would not amount to a revocation within the meaning of s. 20 (*b*).

Partial
revocation.

It is the *animus* which governs the extent and measure of operation to be attributed to the act, and to determine whether the act shall affect the revocation of the whole instrument, or only of some and what portion thereof (*c*).

By obliteration.

Obliteration.—If it cannot be made out what the words

(*t*) *Cheese v. Lovejoy*, (1877) 2 P. D. 251, per James, L.J.

(*u*) *Williams* (10th ed.) 104.

(*x*) (1820) 3 B. & Ald. 489.

(*y*) *Clarke v. Scripps*, *ubi sup.*, at p. 567.

(*z*) *Giles v. Warren*, (1872) L. R. 2

P. & D. 401

(*a*) *Clayton v. Clarkson*, (1862) 2 Sw. & Tr. 497.

(*b*) *Mills v. Millward*, (1889) 15 P. D. 20, per Butt, J.

(*c*) *Clarke v. Scripps*, *ubi sup.*

originally were the obliteration is valid, and probate must then be granted as if there were blanks in the Will (*d*).

The statute does not draw any distinction between modes of obliteration. The obliteration is to be valid and have effect "except so far as the words or effect of the Will before such alteration shall not be apparent." This means apparent on the face of the instrument itself, and does not mean capable of being made apparent by extrinsic evidence. Words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the section, if experts using magnifying glasses, when necessary, can decipher them and satisfy the Court that they have done so; but it is not allowable to resort to any physical interference with the document so as to render clearer what may have been written upon it. If a piece of paper has been pasted on a legacy as a means of obliteration the Court will not remove the pasted paper; but if the words under the paper can be read by an expert in writing, on placing a piece of brown paper round them and holding the document against a window pane, they are apparent within the meaning of the section. That is not to resort to artificial means at all (*e*). Where, however, a testatrix wrote something on the back of her first codicil, and at a later date pasted a piece of blank paper over it, the Court ordered the removal of the blank piece of paper in order to ascertain whether what had been written by the testatrix amounted to a revocation of the codicil (*f*).

Words obliterated must not be "apparent."

Magnifying glass may be used, but no physical interference with document.

Under the doctrine of dependent relative revocations, if the act of cancelling is done with reference to another act meant to be an effectual disposition, it will be a revocation or not, according as the relative act is efficacious or not (*g*). For instance, where a Will was altered in pencil and then cancelled only preparatory to the deceased making a new Will, which he was prevented by death, it was held there was no revocation (*h*).

Doctrine of dependent relative revocation.

(*d*) Williams (10th ed.) 107; In the Goods of James, (1858) 1 Sw. & Tr. 238.

P. 183.

(*g*) Williams (10th ed.) 110.

(*e*) Finch v. Coombe, [1894] P. 191.

(*h*) In the Goods of Applebee, (1828)

(*f*) In the Goods of Gilbert, [1893]

1 Hagg. 143.

For although the testator does an act which unexplained would be one of revocation, yet if it appears that he did it only as a part of the means of setting up another Will, if that end is not accomplished the former Will is not revoked (*i*).

When principle applies Court may have recourse to any means to ascertain obliterated words.

Where the destruction or obliteration was intended to be dependent on the efficacy of a substituted disposition, as where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has ineffectually substituted another name for it, or where the amount of a legacy has been obliterated or covered over, leaving the name of the legatee untouched, the principle of dependent relative revocation is applicable, and the Court may have recourse to any means of legal proof by which to ascertain the original disposition (*k*).

Cancellation under a mistake of law—as under a mistake that a second Will duly executed operated upon property contained in the first—is equally inoperative to revoke, as if made under a mistake of fact (*l*).

Destruction of second Will does not revive first.

Having regard to s. 22 of the Wills Act (*m*), the destruction of a second Will, itself revoking one of prior date, cannot restate the first Will even though it be in existence at the time of the testator's death.

Codicil not impliedly revoked by revocation of Will.

A codicil is, *prima facie*, dependent on the Will, and before the passing of the Wills Act the principle was that a codicil fell to the ground with the Will when the Will was revoked, unless a contrary intention could be established (*n*). Since the Wills Act the principle would seem to be that a codicil will not be impliedly revoked merely by the destruction or revocation of the Will, for where a testamentary document is produced, and is proved to have been duly executed as such, it must be admitted to proof unless it has been revoked in one or other of the ways referred to in the statute (*o*).

Will executed in duplicate.

If a Will is executed in duplicate, and the testator keeps one

(*i*) *Danse v. Crabb*, (1873) L. R. 3 P. & D. 98, 104.

East, 423, 440.

(*k*) In the Goods of McCabe, (1873) L. R. 3 P. & D. 94; In the Goods of Horsford, (1874) L. R. 3 P. & D. 211.

(*m*) *Post*, p. 38.

(*n*) Williams (10th ed.) 113.

(*o*) *Gardner v. Courthope*, (1886) 12 P. D. 14.

(*l*) *Perrott v. Perrott*, (1811) 14

part himself and deposits the other with some other person, and the testator mutilates or destroys the part in his own custody, it is a revocation of both. The presumption of law in such case, liable of course to be rebutted by evidence, is that the destruction or mutilation of the one duplicate was done *animo revocandi* as to both.

Presumption of law in case of destruction of one duplicate.

The same presumption holds, though in a weaker degree, where both the instruments are in the testator's possession.

And where the testator, having both duplicates in his possession, alters one, and then destroys that which he had altered, there also the same presumption holds, but still weaker (*p*).

If a Will was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is presumed to have done the act *animo revocandi* (*q*).

Presumption as to mutilated Will found in testator's custody.

If a Will traced to the possession of the deceased and last seen there is not forthcoming on his death it is presumed to have been destroyed by himself (*r*).

Presumption as to Will not forthcoming.

The presumption will be more or less strong according to the character of the custody which the testator had over the Will (*s*). It may be rebutted by declarations by the testator of good will towards the parties benefited by the Will, or of an adherence to the Will and the contents of the Will itself (*t*).

Evidence rebutting presumption.

The presumption does not apply to a case where the testator became insane after the execution of the Will and continued insane until his death (*u*).

If a Will duly executed is destroyed, either in the lifetime of the testator without his authority, or after his death, it may be established, upon satisfactory proof being given of its having been so destroyed, and also of its contents (*x*).

Will destroyed without authority

(*p*) *Pemberton v. Pemberton*, (1807) 13 Ves. 290, 310.

(1876) 1 P. D. 154, 200.

(*t*) *Ibid.*

(*q*) *In the Goods of Lewis*, (1858) 27 L. J. P. & M. 31.

(*) *Sprigge v. Sprigge*, (1868) L. R. 1 P. & D. 608.

(*r*) *Welch v. Phillips*, (1836) 1 Moo. P. C. 299.

(*x*) *Williams* (10th ed.) 117; *Sugden v. Lord St. Leonards*, *ubi sup.*; *Sly v. Sly*, (1877) 2 P. D. 91.

(*s*) *Sugden v. Lord St. Leonards*,

Declarations of testator as secondary evidence of contents of Will.

Probate of so much of contents as is proved.

Declarations inadmissible to prove execution.

No presumption that subsequent Will revokes former.

Two wholly inconsistent Wills of same date.

Declarations, written or oral, made by a testator both before and after the execution of the Will, are, in the event of its loss, admissible as secondary evidence of its contents, and when the contents of a lost Will are not completely proved probate will be granted to the extent to which they are proved. There is not any difference in the principles of law applicable to the case of a lost Will and to those of any other lost document (y).

Declarations made by a testator after the date of an alleged Will are not admissible to prove the execution of the Will (z).

Revocation by subsequent Will.—A subsequent Will is no revocation unless the contents of it are known; and it is not to be presumed from the mere circumstance of another Will having been made that it revoked the former (a).

The subsequent Will must expressly or in effect revoke the former, or the two must be incapable of standing together (b).

The words "last Will," or "last and only Will," do not import that the paper contained a different disposition of property and cannot be treated as an express revocation (c).

Where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will, not appearing, the evidence ought to be most clear and satisfactory, and if oral evidence alone be relied on, such evidence ought to be stringent and conclusive (d).

If there are two testamentary documents of the same date and it cannot be ascertained which of them was executed first, and their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility to probate will be rebutted, and neither document will be admitted to probate, but the Court will endeavour to construe the documents to support the admissibility of both to probate (e).

(y) Sugden v. Lord St. Leonards, *ubi sup.*; In the Goods of James Leigh, [1892] P. 82.

(z) Atkinson v. Morris, [1897] 1 Q. B. 122.

(a) Williams (10th ed.) 122.

(b) *Ibid.* 120.

(c) Cutto v. Gilbert, (1854) 9 Moo. P. C. 131; Freeman v. Freeman, (1854) 5 De G. M. & G. 704.

(d) Cutto v. Gilbert, (1854) 9 Moo. P. C. 131, 140.

(e) Townsend v. Moore, [1905] P. 66.

In *Plenty v. West* (f) the judge remarked that the appointment of executors has always been considered to effect a complete disposition. But this is by no means conclusive of the testator's intention to constitute a substantive Will (g). Where a second Will appoints a fresh executor, if the Wills are not inconsistent, probate will be granted to both the executors (h). Where a second Will appoints no fresh executor, probate of both Wills may be granted to the executor named in the first Will (i). A second Will, disposing of the whole of the testator's property without the appointment of any executor, may operate as a total revocation of a prior Will, even though an executor may have been appointed by such prior Will (k), but only if the dispositions are so inconsistent that the papers cannot stand together (l).

Appointment of executors not conclusive of intention to constitute substantive Will.

A Will of a date prior to a Will with a revocatory clause may be admitted to probate, if there is any part of it which the Court is satisfied that it was not the intention of the testator to revoke (m).

Revocatory clause not conclusive.

A codicil which absolutely revokes and makes void all bequests and dispositions in a Will and nominates executors, but does not in direct terms revoke the appointment of executors and guardians in the Will, does not revoke the Will; for the legal operation of a codicil is to confirm such parts of the Will to which it refers as it does not revoke (n).

A later Will may revoke earlier testamentary documents although the earlier documents may have disposed of the whole estate of the deceased and although the last document contains no express clause of revocation and leaves the residue undisposed of (o).

Implied revocation by later Will.

(f) (1845) 1 Robert. 264, 269.

(g) *Richards v. Queen's Proctor*, (1854) 18 Jur. 540.

(h) *In the Goods of Leese*, (1862) 2 Sw. & Tr. 442; *In the Goods of Morgan*, (1867) L. R. 1 P. & D. 323.

(i) *In the Goods of Griffith*, (1872) L. R. 2 P. & D. 457.

(k) *Henfrey v. Henfrey*, (1840) 2 Curt. 468; 4 Moo. P. C. 27; *Townsend*

v. Moore, [1905] P. 66, 78.

(l) *O'Leary v. Douglass*, (1878) 1 L. R. Ir. 45.

(m) *Williams* (10th ed.) 122.

(n) *In the Goods of Howard*, (1869) L. R. 1 P. & D. 636.

(o) *Dempsey v. Lawson*, (1877) 2 P. D. 98; *In the Estate of Bryan*, [1907] P. 125.

The intention of the testator is the sole guide, and it is to be gathered from a consideration of the substance, and not merely the form, of the testamentary documents (*p*).

Parol evidence of intention admissible.

If, upon the face of a testamentary document and the facts known to the testator at the time of its execution, it is doubtful whether the testator intended altogether to revoke a former Will, the Court will admit parol evidence to ascertain the intention (*q*).

Distinction between Court of Construction and Court of Probate as to admissibility of evidence of intention.

In a Court of Construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited; for the intentions of the deceased as to what instrument shall operate as, and compose, his or her Will are to be there collected from all the circumstances of the case taken together (*r*). But it was considered as a rule of the Prerogative Court that, in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be upon the face of the paper; and, further, the facts alleged and to be proved must completely remove that ambiguity. When no ambiguity whatever appears upon the face of the instrument the Court will not admit parol evidence (*s*).

Revocation of Wills of intermediate date by republication. Revocation of contingent Will by non-happening of condition.

The republication of a Will will revoke any Will intermediate to the original date of the prior Will and the date of its republication (*t*).

A contingent Will is revoked by the not happening of the event on which it depends. The result of the cases appears to be that if the Will is made dependent on the contingency occurring its validity will depend on the happening of the

(*p*) *Ibid.*

(*q*) *Jenner v. Finch*, (1879) 5 P. D. 106; In the Estate of Bryan, *ubi sup.*

(*r*) *Greenough v. Martin*, (1824) 2 Add. 239, at p. 243; *Chichester v. Quatrefages*, [1895] P. 186. As to the admissibility of extrinsic evidence in aid of the interpretation of Wills, see

Re Grainger, [1900] 2 Ch. 756, and *S. C. Higgins v. Dawson*, [1902] A. C. 1, 10.

(*s*) *Williams* (10th ed.) 257, and see *post*, 77.

(*t*) *Williams* (10th ed.) 147; as to the effect of republication of a Will by codicil, see *post*, p. 39.

contingent event, but that if the contemplated possible event is merely the reason of the making of the Will it will be valid and effectual in any event (*u*).

Distinction where contingent event is merely motive for making Will. Evidence of adherence inadmissible.

Since the Wills Act it is clear no evidence of adherence can establish the Will where it is in its terms conditional, since the act of adherence cannot carry the case further than a parol declaration (*x*).

If at the time of the death of the testator it is uncertain whether the condition on which the Will is to take effect will or will not happen, probate will, it would seem, be granted at once, though it will only determine what is to be done with the property in certain events (*y*).

Probate before contingency happens.

If the Will be conditional the condition will attach to the whole document, and therefore a revocation by it of all former Wills is subject to the happening of the contingency (*z*).

Condition attaches to revocatory clause.

But a contingent codicil, notwithstanding the condition fails, may operate as a republication of a Will or to set up an invalid Will, and on that ground will be entitled to probate (*a*).

Contingent codicil.

If a man by a subsequent Will or codicil make a disposition different from a former one, under a false impression, the impulse of which is the foundation of his wish to change his former intent, such an act will be considered only as affecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. And there seems to be no ground for any distinction between cases where the testator acts under a false impression originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him (*b*).

Contingent presumptive revocation.

But there is a distinction between cases where the testator

Distinction where

(*u*) Williams (10th ed.) 134; for cases in which Wills have been held to be or not to be contingent, see Williams (10th ed.) 135, n. (*m*); and see also *In the Goods of Spratt*, [1897] P. 28; *Halford v. Halford*, [1897] P. 36; *Edmondson v. Edmondson*, (1901) 17 T. L. R. 397.

(*x*) Williams (10th ed.) 136.

(*y*) Williams (10th ed.) 137; *In the Goods of Bangham*, (1876) 1 P. D. 429.

(*z*) *In the Goods of Hugo*, (1877) 2 P. D. 73, 75.

(*a*) *In the Goods of Da Silva*, (1861) 2 Sw. & Tr. 315.

(*b*) Williams (10th ed.) 127, 128.

testator
expresses
doubt or
advice.

refers to a fact as having actually happened and where he merely expresses his doubt, supposition, or advice of the fact. In the latter case the subsequent disposition will operate as a complete revocation of the earlier disposition notwithstanding the expression of doubt, supposition, or advice (c). But if the subsequent disposition can be construed as being made conditional on the correctness of the supposition, as where the erroneous belief stated as the motive for increasing certain legacies is as to the extent of the testator's property amounting to a specified sum, the second disposition will be inoperative (d).

Effect of later
disposition
failing owing
to incapacity
of legatee to
take.

Where, however, the second disposition fails for want of capacity in the legatee to take, it would seem that the revocation would be effectual, since the first disposition being expressly revoked, although the legatee under the second disposition cannot take, the Court cannot speculate on whom the testator might have wished to confer the benefit in such an event (e).

Effect of
general
revocatory
clause on
appointment
in prior Will.

A Will containing a clause revoking all former Wills will revoke an appointment made by an earlier Will, whether the power of appointment be special or general (f).

An appointment by Will under a general power will be revoked and the power executed by a later Will containing a residuary bequest and no reference to the power (g).

The execution of a limited power of appointment contained in an earlier Will will not be revoked by general words of bequest contained in a later Will (h).

SECT. 6.—Of Republication of Wills.

Sect. 22. By
re-execution
or codicil.

Sect. 22 of the Wills Act provides that "no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and

(c) Williams (10th ed.) 129.

(d) Thomas v. Howell, (1874) L. R. 18 Eq. 198.

(e) Williams (10th ed.) 113; Tupper v. Tupper, (1855) 1 Kay. & J. 665; Quinn v. Butler, (1868) L. R. 6 Eq.

225.

(f) Re Kingdon, (1886) 32 C. D. 604.

(g) Kent v. Kent, [1902] P. 108.

(h) Cadell v. Wilcocks, [1898] P. 21.

showing an intention to revive the same ; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Revival not to extend to part revoked before revocation of whole.

A codicil has the effect of republishing the Will to which it refers as from the date of the codicil, so as to bring down the date of the Will to the date of the codicil (i). But reference to the Will is necessary. In order that republication may be implied, something must be found in the second testamentary instrument from which the inference can be drawn that, when making and executing it, the testator "considered the Will as his Will" (k).

Codicil to revive Will must refer to it expressly or by inference.

The reference need not be by date, but there must be a sufficient identification in the reviving codicil of the Will intended to be revived (l).

Where a testator refers in a codicil to a last Will, and there is nothing in the contents of the codicil to point to any particular Will, it must be construed to refer to the Will in legal existence as the last Will and not to a revoked Will (m).

Reference in codicil to a last Will.

Where a codicil, by mistake as to the date of a prior Will, refers to an earlier Will than that intended to be referred to, the codicil will not revive the earlier Will to which it refers, and the codicil may be admitted to probate together with the later Will (n). But where it is not a mere mistake of date, but the codicil makes reference to the provisions of the earlier Will, such earlier Will is confirmed and will revive ; and as the later Will was not revoked by the codicil, all three documents must be admitted to probate (o).

Error in date of reference.

As every codicil is, in construction of law, a part of the Will, a testator by expressly referring to and confirming the

Codicil confirming Will does not set up part revoked by prior codicil.

(i) *Re Champion*, [1893] 1 Ch. 101 ; *Re Rayer*, [1903] 1 Ch. 685.

(k) *Re Smith*, (1890) 45 C. D. 632.

(l) In the Goods of McCabe, (1862) 2 Sw. & Tr. 474, 478 ; Williams (10th ed.) 144, n. (m).

(m) Williams (10th ed.) 144 ; Hale

v. Tokelove, (1850) 2 Robert. 318, 326.

(n) In the Goods of Ince, (1877) 2 P. D. 111.

(o) In the Goods of Stedham, (1881) 6 P. D. 205 ; In the Goods of Dyke, (1881) 6 P. D. 207.

Codicil reviving revoked Will does not necessarily revive every codicil.

Will will not be considered as intending to set it up against a codicil or codicils revoking it in part (p). Moreover a codicil reviving a revoked Will will not necessarily revive every codicil thereto. "On the one hand where a testator in a codicil uses the word 'Will' abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the Will of the testator, and consequently where a testator by a codicil confirms in general terms his Will or his last Will and testament, the Will, together with all codicils, is taken to be confirmed" "On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original Will unaffected by any codicil" (q).

Effect of reference to Will by date merely.

A reference to the Will by its date merely will not set up an inoperative codicil, nor revoke all instruments other than the original Will itself. To the latter class of cases the principle applies that a clear disposition is not to be revoked except by clear words (r).

Codicil cannot revive Will not in existence.

A testator cannot by codicil revive a Will not only revoked but destroyed, since it has no existence (s).

Sect. 34. Revived Will to be deemed made at time when revived.

Sect. 34 of the Wills Act provides that "every Will re-executed or republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived."

Incorporation by republication of unattested alterations and unexecuted papers.

A codicil duly executed will give effect and operation to unattested alterations in a Will; or to unexecuted papers which have been written between the periods of the execution of the Will and codicil, where the Will, if treated as executed on the date of the codicil and read as speaking at that date, contains language which would operate as an incorporation of the documents to which it refers (t).

(p) Williams (10th ed.) 147; In the Goods of De la Saussaye, (1873) L. R. 3 P. & D. 42.

(q) Per Fry, J., in Green v. Tribe, (1878) 9 C. D. 231, 234.

(r) *Ibid.* 237.

(s) In the Goods of Steele, (1868) L. R. 1 P. & D. 575, 576; In the Goods of Reade, [1902] P. 75.

(t) Williams (10th ed.) 154; In the Goods of Smart, [1902] P. 238, 241; *ante*, p. 9.

CANADIAN NOTES.

Persons Capable of Making a Will.

Provincial enactments exist which enable aliens to take, **Aliens.** hold and transmit property and therefore to make wills. See R.S.B.C., c. 6; R.S.M., c. 3; R.S.N.B., c. 157; R.S.N.S., c. 136, s. 1; R.S.O., c. 118.

By s. 1033, R.S.C., c. 146, it is enacted that no confession, **Convicts.** verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada.

While felons may take under a will, a beneficiary who, by murder or manslaughter caused the death of the testator cannot take the devise. *Lundy v. Lundy* (1895), 24 S.C.R. 650.

An infant, even if married, cannot make a will. In Sas- **Infants.** katchewan there is an express enactment to that effect. The enactments which empower a married woman to make a will remove only the disability of coverture, and not the disability of infancy. *Re Murray Canal* (1884), 6 O.R. 685, at page 691. See R.S.B.C., c. 193, s. 5; R.S.M., c. 174, s. 4; R.S.N.B., c. 160, s. 3; R.S.N.S., c. 139, s. 4; R.S.O., c. 128, s. 11.

In various provinces of Canada enactments have been **Married women.** passed enabling a married woman to dispose by will of any real or personal property in the same manner as if she were a *feme sole*. See R.S.B.C., c. 130, s. 4; R.S.M., c. 106, s. 6; R.S.M., c. 174, s. 2(d); R.S.N.B., c. 78, s. 3(1); R.S.N.B., c. 160, s. 28(1); R.S.N.S., c. 112, s. 4; R.S.O., c. 128, s. 9(5); R.S.C., c. 62; c. 15, s. 2(4), s. 3, s. 5, Sask. Acts, 1907; c. 19, s. 10, Alberta Acts, 1906.

Subject to the provisions of the Indian Act, R.S.C., c. 81, **Indians.** s. 25, an Indian, male or female, may make a will and dispose of real or personal property. *Johnson v. Jones* (1895), 26 O.R. 109.

Mental Capacity.

There is a difference between mental capacity as understood in medicine and as understood in law. *McHugh v. Dooley* (1903), 10 B.C.R., at page 543.

Delusions.

It is not essential to the validity of a will that the testator should be of sufficient disposing capacity when he signs the will, if it be established that he was of testamentary capacity when he gave the instructions for a will, and that a will in accordance with such instructions and understood by him to be a will is properly executed by him. *Kaulbach v. Archbold* (1901), 31 S.C.R. 387. Harmless delusions traceable to extreme age and senile dementia will not necessarily establish incompetency. *McHugh v. Dooley* (1903), 10 B.C.R. 537. To invalidate a will because of a delusion on the part of the testator the delusion must result from unsoundness of mind; an unfounded belief is not sufficient. A testator excluded a child from the benefits of his will under an unfounded belief that she was not his child, and the court held that it did not amount to an insane delusion. *Bell v. Lee* (1883), 8 A.R. 185. (The authorities on the burden of proof as to the insane delusion are reviewed in this case.) "If the testator was suffering under a species of monomania, that fact would not be sufficient. He must be suffering under an insane delusion as to his property, and the persons to whom he wishes to bequeath it, and not as to a mere fact. The true criterion is laid down in *Dew v. Clark*." *Re Kidney* (1895), 33 N.B.R. 9, per Barker, J. See also *Skinner v. Farquharson* (1901), 32 S.C.R. 58, where the will was upheld although the testator entertained an unfounded belief respecting improper relations between his wife and son. But if the delusion as to the wife is of such a nature as to render the testator not capable of considering her claims upon his bounty the court will refuse to uphold the will. *Re Maxwell* (1876), 10 N.S.R. 229.

To invalidate the will the testator's delusion must have been in actual operation at the time he made the will, so as to have influenced him in the disposition of his property:

Skinner v. Farquharson, *supra*. The capacity required of the testator is that he should be able rationally to consider the claims of all those who are related to him and who according to the ordinary feelings of mankind are supposed to have some claim on his consideration. *Ib. per Davies, J.*, following *Smee v. Smee*, cited *ante*, p. 16.

Evidence of Capacity.

Those who propound the will must shew that the testator when he made it had sufficient memory to enable him to comprehend the extent of his property and the manner of distributing it; (*Re Harrison* (1891), 30 N.B.R. 164), and that he thoroughly understood the contents of the will. *Freeman v. Freeman* (1889), 19 O.R. 141; *McLaughlin v. McLellan* (1896), 26 S.C.R. 646; *Emes v. Emes* (1865), 11 Gr. 325; *Martin v. Martin* (1869), 15 Gr. 586; *Thompson v. Torrance* (1881), 28 Gr. 253, 9 App. R. 1.

Burden of proof.

In proceedings attacking a will on the ground of want of mental capacity, letters written by the testator to his relatives before making his will, stating his intention to leave his property to them, are not admissible in evidence to defeat a will in favour of other persons. *Doe dem. Levi v. Samuel* (1868), 12 N.B.R. 265.

The onus of establishing competency is on those who propound a will. *Madill v. McConnell* (1908), 12 O.W.R. 452. In the absence of some evidence of capacity the question of capacity as a fact cannot be left to a jury. *Doe dem. Levi v. Samuel* (1868), 12 N.B.R. 265; *Doe dem. Violette v. Therriau* (1877), 17 N.B.R. 389. Evidence of very eccentric or capricious conduct does not establish incompetency. *Re Eliza Wilkie* (1884), 17 N.S.R. 543; *Re Hazen* (1876), 16 N.B.R. 329; nor does insanity on occasions other than the time when the will was made; *Ingoldsby v. Ingoldsby* (1873), 20 Gr. 131. The fact that the testatrix herself unaided, drew a rational will is strong evidence of mental capacity. *McHugh v. Dooley* (1903), B.C.R. 537.

Letters probate granted in common form are only *prima facie* evidence of testamentary capacity of the testator as to

real estate, notwithstanding the Devolution of Estates Act (Ontario), and in an action to recover land under such a will the defendant may give evidence of testamentary incapacity. *Sproule v. Watson* (1896), 23 App. R. 692.

Weight of
evidence.

The weight to be given to the evidence of physicians is considered in *McHugh v. Dooley* (1903), 10 B.C.R. at p. 543, and *Menzies v. White* (1862), 9 Gr. 574; the value to be attached to the evidence of interested persons is discussed in *Wright v. Jewell* (1893), 9 Man. R. 607, and *Wilson v. Wilson* (1875), 22 Gr. 39, 24 Gr. 277; and the weight to be given to the evidence of the witnesses to the will and of witnesses generally, is considered in *Re Harrison* (1891), 30 N.B.R. 164.

Where the evidence was conflicting and there had been failure to call the attesting witnesses the case was remitted for a new trial. *Madill v. McConnell* (1908), 12 O.W.R. 452.

Evidence in rebuttal was offered to shew statements made by testator before the date of the will, and inconsistent therewith. This evidence the trial Judge rejected and it was held that its rejection was discretionary with the Judge. *McLaughlin v. McLennan*, 28 N.S.R. 226.

Execution and Attestation.

The statutory requirements in the various provinces of Canada as to execution and attestation of wills are substantially the same. R.S.B.C., c. 193, s. 6; s. 11, s. 12, s. 13, s. 14; R.S.M., c. 174, s. 5, s. 11, s. 12, s. 13, s. 14; R.S.N.S., c. 139, s. 6, s. 11; R.S.N.B., c. 160, s. 4; R.S.O., c. 128, s. 12, s. 16, s. 17, s. 18, s. 19. In Nova Scotia, however, there is a special provision with regard to the wills of married women. R.S.N.S., c. 139, s. 15.

In Manitoba it has been enacted that a holograph will does not require an attesting witness. R.S.M. 1902, c. 174, s. 10.

Where it appears that the testator intended to execute the document as his last will and where the witnesses clearly intended to attest and subscribe it as such, the tendency of the courts is to interpret liberally the actions of the parties

as a compliance with the statute, if it is possible so to do without offending against any of the express enactments. *Re Harvie* (1908), 7 W.L.R. 103.

If the signature of the testator is not made in the presence of the witnesses acknowledgment in their presence and hearing must be proved. No acknowledgment is sufficient unless at the time the witnesses either saw or might have seen the testator's signature. *McNeil v. Cullen* (1904), 35 S.C.R. 510. But acknowledgment may be inferred from surrounding circumstances. *Doe dem. McVey v. Daniel* (1874), 15 N.B.R. 372. There must be some proof of execution to lead the Court to a conclusion. *Williamson v. Williamson* (1889), 17 O.R. 734; *Re Pine* (1878), 12 N.S.R. 307. Acknowledgment.

The addition of an attestation clause to the will is not necessary. *Re Harvie* (1908), 7 W.L.R. 103.

If the testator does not sign the will in the presence of the witnesses and its proof depends upon his acknowledgment of the signature, there must be some clear evidence to shew the testator's acknowledgment. *McNeil v. Cullen* (1904), 35 S.C.R. 510. Clear evidence necessary.

An unfinished draft of a will signed by a testator at the suggestion of another person, the paper having been brought to the signer without his request, cannot be admitted to probate unless his testamentary capacity is clearly established. *Re Gilbert* (1877), 17 N.B.R. 525. The presumption is always against the validity of a will which bears self-evident marks of being unfinished. (*Ib.*)

A document was held to be testamentary and therefore inoperative for lack of witnesses which was signed by an insured person and directed to the managers of the Insurance Company and was in these words: "I give and bequeath to — the amount stated on the policy given on my life by the S. Insurance Company. To be paid to none other unless at my request dated later." This document was handed by the signer to the plaintiff in the action, the signer saying: "There, that is as good as a will." *Kreh v. Moses* (1892), 22 O.R. 307.

Evidence that the testator was in the same room as the witnesses and also actually did see the witnesses sign is not essential, so long as it appears that he could see them sign had he desired; *Carrigan v. Carrigan* (1865), 6 N.S.R. 8; *Scott v. Scott* (1887), 13 O.R. 551; and was mentally capable of understanding what was then being done. *Doe dem. Violette v. Therriau* (1877), 17 N.B.R. 389.

Execution
inferred.

Evidence that the testator produced a paper as his signed will and asked witnesses to attest it will justify the inference that the will was either signed or acknowledged in presence of the witnesses. *Re Ferguson* (1881), 21 N.B.R. 71.

There is a strong presumption in favour of proper attestation, if the usual attestation clause is signed by the witnesses, (*Little v. Aikman* (1869), 28 U.C.R. 377), but where the signature of the testatrix was not made in the presence of the witnesses and her acknowledgment of her signature was sought to be established in proceedings to prove the will in solemn form this presumption will not suffice. *McNeil v. Cullen* (1904), 35 S.C.R. 510.

In regard to the position of the testator's signature, much latitude is given by the statute. *Re Harvie* (1908), 7 W.L.R. 103.

Where the testator was unable to sign a will, which was signed without his authority by one of the executors named, and one clause of which was not correctly read to the testator, the document was held not to be properly executed, although it had been drawn substantially in accordance with a sketch prepared by the testator. *Re Pine* (1878), 12 N.S.R. 307.

Holograph
will.

Where the signatures of the witnesses to a holograph will could not be proved, but the signature of the testator was proved, and post-testamentary letters of the deceased in which he referred to a will were found, and the will was found in a place where he was accustomed to keep his papers, and it was also proved that the testator had knowledge of the requirements of attestation and had been seen in the company of two strangers on the day of the date of the will, to which he re-

ferred in one of his letters, and the Surrogate Judge was satisfied with the proof, his finding was not disturbed. *Re Young* (1896), 27 O.R. 698.

To set aside probate of a will and establish a holograph will alleged to have been executed at a later date, and discovered nine years after testator's death, the finder being himself a beneficiary under it, the evidence must be clear and unimpeachable. *Foulds v. Bowler* (1908), 8 W.L.R. 189.

Where there was no positive evidence of the subscription by a witness, since deceased, yet from the circumstances attending the execution, and the fact that possession of the land devised had for sixteen years been in accordance with the will, the Court inferred subscription by the witness. *Crawford v. Curragh* (1864), 15 C.P. 55. And where a will was proved in common form on the oath of K., one of the subscribing witnesses, and remained unquestioned for 24 years, when, in proceedings to set aside the will, after the death of the witness on whose oath it was proved, the remaining witness H. and his brother, who were interested persons swore that H. did not sign his name as witness until after the testator's death, and the probate Judge revoked the probate, his decision was reversed on appeal. *Re Estate Hill* (1901), 34 N.S.R. 494. Lapse of time.

Where the will was nearly thirty years old and one of the three subscribing witnesses said he believed he had signed it as a witness, although neither he nor another of the subscribing witnesses could remember having signed it, but another witness at the trial, who was not a subscribing witness testified that it was executed by the testator in the presence of the three witnesses to it and that she had seen them sign as witnesses, the proof of execution was held sufficient. *McDonald v. McKinnon* (1865), 5 N.S.R. 527. Sufficient proof.

Where there were three witnesses to a will requiring that number, one of whom was disqualified as a witness at the trial, and the other two proved their own attestation but could not prove that of the third, on proof of the handwriting of

the third the Court held the will to be well executed. *Hamilton v. Love* (1843), 4 N.B.R. 243.

Where two out of three witnesses to a will were marksmen and at the trial could not identify the will, but the third did so and also proved the marks of the other two the will was upheld. *Re Hanlon* (1874), 15 N.B.R. 136.

Where the witnesses did not sign in the usual way, but the solicitor added an affidavit at the foot of the will which was signed and sworn to by both of the witnesses, the concluding portion of the affidavit being on an additional page following the page containing the signature of the testatrix, the will was held properly executed. *Re Harvie* (1908), 7 W.L.R. 103.

A will having first been duly executed was altered by taking out two sheets and re-writing them, and placing the new sheets in the will and pinning the whole together, the date being also changed. The signatures of the testator and the witnesses remained and were acknowledged by all three. Subsequently the two re-written sheets were taken out and destroyed by direction of the testator but not in his presence, and it was held that this will was not properly executed. *O'Neill v. Owen* (1888), 17 O.R. 525.

Clear evidence of acknowledgment necessary.

Where a solicitor testified that a will was signed before the witnesses appeared, and he, on their arrival asked the testatrix if the signature was hers and if she wished the witnesses to witness it, to which she answered "yes," but the two witnesses deposed that they did not hear this alleged conversation, and the Judge of Probate held against the will, the Supreme Court of Canada refused to disturb his finding and held that there must be some clear evidence of the acknowledgment of the testatrix. *McNeil v. Cullen* (1904), 35 S.C.R. 510.

Contents of lost will.

Where a will could not be found after the death of the testator, statements made by him as to its provisions are admissible in evidence in proceedings to establish the will, and in corroboration of the chief beneficiary who had drawn it; it also appearing that the testator was without any relatives

and knew that if he left no will his property would go to the Crown. *Stewart v. Walker* (1903), 6 O.L.R. 495.

In Ontario it has been decided that where a will is sufficiently attested by two witnesses, and a third who is a devisee also subscribes as a witness, the gift to him is, nevertheless, void. *Little v. Aikman* (1869), 28 U.C.R. 337. See, however, *Re Sturgis* (1889), 17 O.R. 342. See also as to interpreting such a will, *Re Maybee* (1904), 8 O.L.R. 601. But in New Brunswick, Nova Scotia and Saskatchewan, it is provided that if there are two witnesses who are not interested and who prove the will, and a supernumerary witness who, or whose husband or wife takes a benefit under the will, the gift to the latter is not void. R.S.N.B., c. 160, s. 9; R.S.N.S. c. 139, s. 12; c. 15, s. 12, Sask. Acts, 1907.

Soldiers in actual military service, or seamen being at sea, may dispose of personal estate as they might have done before the passing of the existing provincial statutes. R.S.O., c. 128, s. 14; R.S.B.C., c. 193, s. 9; R.S.M., c. 174, s. 8; R.S.N.B. c. 160, s. 6; R.S.N.S., c. 139, s. 9; c. 15, s. 6, Sask. Acts, 1907.

Undue Influence.

In order to set aside a will for undue influence it is not sufficient to shew that the circumstances are consistent with the hypothesis that its execution was obtained by undue influence. It must be shewn that they are inconsistent with a contrary hypothesis. *Adams v. McBeath* (1896), 27 S.C.R. 13. As to circumstances which raised a strong presumption against an impeached will but yet were not inconsistent with any other hypothesis than undue influence. See *Cornwall v. Cornwall* (1908), 12 O.W.R. 552. The control or influence over the testator must be of such a nature as to make the will that of the influencing person and not the will of the testator as a free agent. *Waterhouse v. Lee* (1863), 10 Gr. 176. See also *Donaldson v. Donaldson* (1866), 12 Gr. 431. The importunity must be such as to render the act not his own. *R. C. Episcopal Corporation v. O'Connor* (1907), 14 O.L.R. 666.

In order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, it must be an influence exercised either by coercion or fraud. *Tellier v. Schliemans* (1907), 7 W.L.R. 229.

Persuasion
lawful.

Persons in a position to exercise considerable influence over the testator, such as his house-keeper, who had lived with him for many years (*Kaulbach v. Archbold* (1901), 31 S.C.R. 387) or his sister (*R. C. Episcopal Corporation v. O'Connor, supra*), or his spiritual adviser and confessor (*Collins v. Kilroy* (1901), 1 O.L.R. 503; *Re Dooley* (1885), 18 N.S.R. 407) or the son of testatrix with whom she lived (*McHugh v. Dooley* (1903), 10 B.C.R. 537), may lawfully urge and persuade the testator to benefit them under his will, so long as the volition of the testator is not overborne and subjected to the domination of the beneficiary, but if such beneficiary takes part in drawing the will or procures it to be prepared without the intervention of any faithful witness, or any one capable of giving independent evidence as to the testator's intention and instructions, the onus rests upon him to discharge any imputation of undue influence as the document will be regarded with suspicion and its invalidity presumed. *McHugh v. Dooley* (1903), 10 B.C.R. 537; *Wright v. Jewell*, 9 Man. R. 607. And the evidence of the person who promotes such a will in his own favour, if uncorroborated, is not sufficient to uphold the will. *British & Foreign Bible Society v. Tupper* (1905), 37 S.C.R. 100; *Hogg v. Maguire* (1885), 11 A.R. 507. But such beneficiary satisfies the onus cast upon him, by proving that the testator lived for ten years afterwards and recovered his usual health and spoke of having made his will and did not alter it. *Connell v. Connell* (1906), 37 S.C.R. 404. And where it appeared that such beneficiary had instructed a solicitor who was a stranger to him, to prepare such a will and the solicitor did so and read it to the testator and the testator assented to it and executed it the will was upheld. *Adams v. McBeath* (1894), 3 B.C.R. 513, 27 S.C.R. 13.

Onus how
satisfied.

Where a testator's estate was worth \$50,000, and he had no children, it was considered doubtful if a bequest to the proponent, his brother, was such a substantial benefit that it gave rise to the onus contended for by those opposing the will. *Connell v. Connell* (1906), 37 S.C.R. 404.

The mere fact that the beneficiary was in the same room as the testator when instructions were taken by the solicitor does not raise a suspicion making the will *prima facie* void, or throw the onus of explanation upon the defendant. *Tellier v. Schliemans* (1907), 7 W.L.R. 229.

The making of the will need not originate with the testator, provided that he understands and sanctions the disposition proposed to him and that the instrument embodies such disposition. *Re Fitch Estate* (1894), 28 N.S.R. 75.

Alterations.

The various provinces of Canada have passed enactments providing that no alteration made in any will after the execution thereof shall have any effect unless such alteration is duly executed in accordance with the terms of the enactment. R.S.O., c. 128, s. 23; R.S.B.C., c. 193, s. 18; R.S.M., c. 174, s. 18; R.S.N.B., c. 160, s. 15; R.S.N.S., c. 139, s. 21.

The Nova Scotia Statute also provides that cancelling by drawing lines across a will, or any part thereof, shall not have any effect unless such alteration is executed in the manner required for the execution of a will.

The onus rests on a party asserting it to shew that an interlineation, made since the foregoing enactments, which is not signed and attested, was made before execution, where the will contains other interlineations properly signed and attested. *Re Lawson* (1893), 25 N.S.R. 454.

Documents or memoranda in existence at the date of the execution of a will may be incorporated with the will by express reference to them, but not documents or memoranda coming into existence after the execution of the will. *Re Seaman* (1866), 6 N.S.R. 185.

Incorporating documents.

*Revocation.***By marriage.**

The revocation of a will, and the revival of a revoked will have been the subject of legislation in the various Provinces of Canada. By these provincial enactments a will is revoked by the marriage of the testator, except a will made in exercise of a power of appointment, where the property would not, in default of appointment, go to his heir or other representative or next of kin. R.S.O., c. 128, s. 20(2); R.S.B.C., c. 193, s. 15; R.S.M., c. 174, s. 15; R.S.N.B., c. 160, s. 12. In Ontario, Nova Scotia and Saskatchewan, however, it is enacted that the marriage of the testator does not revoke the will in the following cases: (a) Where it is declared in the will that the same is made in contemplation of such marriage; (b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed within one year after the testator's death, in the office designated in the enactment; (c) Where the will is made in the exercise of a power of appointment and the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin, under the Statute of Distribution. R.S.O., c. 128, s. 20 (1); R.S.N.S., c. 139, s. 18; c. 15, s. 17, Sask. Acts, 1907.

Presumption of marriage.

Where a man and woman were married in Ireland under assumed names and lived together for two years, and some years afterwards went through another ceremony in New Brunswick in their right names, it was held, without any evidence as to the law of Ireland, that the first ceremony must be presumed to have constituted a marriage and therefore that a will made after it and before the second ceremony was not revoked by the second. *Re Tiernay* (1885), 25 N.B.R. 286.

Change of domicile.

By enactments in Ontario and in Nova Scotia it is provided that no will shall be held to be revoked by change of domicile. c. 18, s. 4. Ontario Acts, 1902; c. 139, s. 17, R.S.N.S.

Altered circumstances.

"No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances": R.S.O.,

c. 128, s. 21; R.S.B.C., c. 193, s. 16; R.S.M., c. 174, s. 16; R.S.N.B., c. 160, s. 13; R.S.N.S., c. 139, s. 19; c. 15, s. 18, Sask. Acts, 1907. In view of the foregoing enactments the birth of a child does not revoke a will. *Re Tobey* (1875), 6 P.R. 272. These enactments also contain a provision for the revocation of a will or codicil by a subsequent testamentary document duly executed. Such a provision has been held to mean a will or codicil executed in the same manner as a will. *Re Parker* (1873), 20 Gr. 389.

The revocation by burning, tearing or otherwise destroying, to be effective must be done by the testator or by some one in his presence and by his direction. *Re Toby* (1875), 6 P.R. 272. Destruction of will.

A will which had a seal upon it was found after testator's death with the seal cut out and several pencil marks drawn through the signature, and a subsequent document insufficiently executed as a will was also found amongst his papers. The Court, on the evidence, held that the will was revoked absolutely and not dependently upon another will taking effect. *Re John Drury's Will* (1882), 22 N.B.R. 318.

Re-Publication.

Enactments in various Provinces enable a revoked will to be revived by the re-execution thereof, or by a codicil. Revival.
R.S.O., c. 128, s. 24; R.S.B.C., c. 193, s. 19; R.S.M., c. 174, s. 19; R.S.N.B., c. 160, s. 16; R.S.N.S., c. 139, s. 22.

The intention to revive the will must clearly appear in the codicil. *Macdonell v. Purcell* (1893), 23 S.C.R. 101.

A codicil, dated two years after the will, was expressed to be a codicil to the will which was designated in the codicil by its date, and the testator by this codicil confirmed his will. There was an intermediate codicil revoking a particular bequest in the will. The reference simply to the date of the will was held not to be in itself sufficient to restrict the confirmation to that particular document, but other words and circumstances were held to convey an intention, with reasonable certainty, to confirm the will *in toto* without being affected by the partial revocation made by the intermediate codicil.

McLeod v. McNab (1891), A.C. 471, affirming *Re McLeod*, 23 N.S.R. 154.

Incorporat-
ing
documents.

A will made express reference to certain documents or entries, some of which were then in existence, and others came into existence after the execution of the will. A codicil confirming the will was made subsequent to all these documents or entries, but the codicil did not refer to them in any way, and it was held that the codicil did not incorporate the entries made between the execution of the will and the execution of the codicil. *Re Seaman* (1866), 6 N.S.R. 185.

Codicil.

A codicil to an existing will, confirming it, does not bring the date of the will to the date of the codicil when the source of the bounty springs from the will itself, so as to bring the gift within the statutory limits of the Mortmain Acts. *Holmes v. Murray* (1886), 13 O.R. 756.

A legacy to a witness may be validated by a codicil reviving the will witnessed by other witnesses. *Purcell v. Bergin* (1893), 20 A.R. 535, 23 S.C.R. 101.

A will bequeathed \$1,000 to each of the executors "for the trouble they will have in carrying out the trusts of this my will." By a codicil, reciting that the original executors had died, new executors were appointed and a provision was made authorizing the executors to retain, as remuneration for their services, a commission of five per cent. on all moneys collected under the will. The codicil further provided that the will should be construed as if the names of the new executors were inserted throughout in place of the names of the original executors. It was held that the existing executors were entitled only to the commission mentioned in the codicil. *In re Bossi* (1897), 5 B.C.R. 446.

As to the degree of clearness requisite to establish the contents of a codicil by secondary evidence, see *Re Estate Alex. McLeod* (1890), 23 N.S.R. 154.

For a recent instance where the words of a codicil, drawn loosely by the testatrix herself, were not given their ordinary meaning and effect, owing to the terms of a clause in the will itself and the circumstances under which the codicil was drawn and executed. See *Re Meudell* (1908), 11 O.W.R. 1093.

CHAPTER II.

OF THE APPOINTMENT OF EXECUTOR

SECT. 1.—*Who is capable of being Executor.*

THE King may be constituted executor; in which case he King.
appoints such persons as he shall think proper to officiate the
execution of the Will, against whom such as have cause of
action may bring their suits; also the King may appoint
others to take the accounts of such executors (a).

A corporation sole may be executor (b). Under the Public Corporation
Trustee Act, 1906 (6 Edw. VII. c. 55), ss. 1 and 2, the Public sole.
Trustee is a corporation sole, under that name, and may be
appointed executor either alone or jointly with others (bb).

A corporation aggregate may be appointed executor, and in Corporation
that case the Court will grant letters of administration with aggregate.
the Will annexed to a person, styled a syndic, who has been
duly appointed by the corporation to take the grant (c).

In *In the Goods of Hunt* (d), where a limited company was
appointed executor, the Court granted administration with the
Will annexed to the general manager as the nominee of the
company, and accepted the company as sole surety for the
administrator under the administration bond.

There would be a practical difficulty in appointing a corpora-
tion aggregate to act jointly with an individual as executors,
since a grant of letters of administration with the Will annexed
would not be made so long as there existed a person able and
willing to accept probate (e).

Until the passing of the Bodies Corporate (Joint Tenancy)
Act, 1899 (62 & 63 Vict. c. 20), there was a difficulty in a

(a) Williams (10th ed.) 158.

1 Sw. & Tr. 516.

(b) In the Goods of Haynes, (1842)
3 Curt. 75.

(d) [1896] P. 288.

(bb) See Appendix.

(e) In the Goods of Martin, (1904)

(c) In the Goods of Darke, (1859)

90 L. T. 264.

natural person being a trustee jointly with a corporation, as a corporation and a natural person could not hold property as joint tenants, but only as tenants in common (*f*). This Act (s. 1) provides that a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would if the body corporate had been an individual have created a joint tenancy, they shall be entitled to the property as joint tenants. A limited liability company may be wound up and dissolved, but the Act of 1899 provides that where a body corporate is joint tenant of any property on its dissolution the property shall devolve on the other joint tenant.

A limited company can take and hold land without licence in mortmain under s. 18 of the Companies Act, 1862.

On dissolution of a company under ss. 142 and 143 of the Act of 1862, freehold and leasehold properties will revert to the grantor and do not vest in the Crown as *bona vacantia* (*ff*).

Partnership
firm.

The appointment as executors of an ordinary partnership firm is considered to be an appointment not of the firm collectively, but of the persons composing it individually. Consequently the dissolution of the firm does not affect the appointment (*g*).

Alien.

It would seem that an alien and even an alien enemy was always by our law capable of being executor (*h*).

Effect of
Naturaliza-
tion Act, 1870.

By the Naturalization Act, 1870 (38 Vict. c. 14), s. 2, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject.

Infant.

An infant may be appointed executor, and even a child *en ventre sa mère*. But if an infant is appointed sole executor, by stat. 38 Geo. III. c. 87, s. 6, he is altogether disqualified

(*f*) *Re* Thompson's Settlement Trusts, [1905] 1 Ch. 229.

(*ff*) *Hastings Corporation v. Letton*, [1908] 1 K. B. 378, 387.

(*g*) *In the Goods of Fernie*, (1849) 6 N. C. 657.

(*h*) *Williams* (7th ed.) 229.

from exercising his office during his minority, and administration *cum testamento annexo* shall be granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant shall have attained the age of twenty-one years. This Act only applies in case of an infant being sole executor; for if there are several executors, and one of them is of full age, no administration *durante minore etate* ought to be granted, for he who is of full age may execute the Will (i).

Inasmuch as the wife could not do any act which might prejudice her husband without his consent, she could not formerly by our law take upon herself the office of executrix without his consent. So also before the Married Women's Property Act, 1882, a married woman could not take administration without the consent of her husband. And although the administration was always committed to the wife alone, yet the husband might during her life act in the administration, with or without her assent (k).

Married woman.

Now since January 1, 1883, by the Married Women's Property Act, 1882, s. 1 (2), a married woman is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract and of suing and being sued either in contract or tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be made a party to any action or other legal proceedings brought by or taken against her, and any damages or costs recovered against her in any action or proceeding shall be payable out of her separate property and not otherwise. And by s. 24 the word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be

Effect of Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Husband not liable unless

(i) Williams (10th ed.) 159.

(k) As to the law before the Act see Williams (10th ed.) 160, 360;

Clough v. Bond, (1838) 3 My. & Cr. 490; Soady v. Turnbull, (1866) L. R. 1 Ch. 494.

he inter-
meddles.

subject to such liabilities unless he has acted or intermeddled in the trust or administration.

Husband need
not join in
administra-
tion bond.

Since this Act it is not necessary that the husband should join in the administration bond (l).

As executrix
or administra-
trix she has
power to dis-
pose of real
or personal
property.

By s. 18 (read in connection with s. 6) of the Act a married woman who is an executrix or administratrix alone or jointly with any other person or persons may sue or be sued, and she was given power to transfer certain stocks, shares, and funds in that character without her husband, but this section was not exhaustive, and her husband's concurrence was still necessary in respect of properties not enumerated, and for the conveyance of the legal estate in real property (m), unless she happened to be a bare trustee (n). But now by the Married Women's Property Act, 1907 (o), a married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. The Act operates to render valid and confirm all such dispositions made after December 31, 1882, and before the commencement of the Act.

Persons
attainted or
outlawed

Persons who formerly were attainted or outlawed were not disabled from being executors. They might sue as executors, because they sued in *autre droit* (p).

The Trustee Act, 1893, s. 48 (which replaces s. 46 of the Trustee Act, 1850 (18 & 14 Vict. c. 60)), provides that "property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment

(l) In the Goods of Ayres, (1883) 8 P. D. 168.

(m) *Re Harkness & Allsopp's Con- tract*, [1896] 2 Ch. 358.

(n) *Re Howgate & Osborn's Con-*

tract, [1902] 1 Ch. 451, 456.

(o) 7 Edw. VII. c. 18, s. 1.

(p) Williams (10th ed.) 161, and see *ante*, p. 21.

shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee."

Under s. 50, the expression "trust" includes "the duties incident to the office of personal representative of a deceased person."

Sect. 25 (1) of the same Act enables the Court to make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt; but by sub-s. 8 "nothing in this section shall give power to appoint an executor or administrator." The Court can, however, under the Judicial Trustee Act, 1896, remove an executor and appoint a person to act in his place (q).

Before the Judicature Act, 1873, the Court could not refuse to grant probate to a person appointed executor, on account of his poverty or insolvency, and in consequence the Court of Chancery assumed the jurisdiction to restrain an insolvent or bankrupt executor (r). This jurisdiction will still be exercised in the case of a bankrupt executor, and unless there is another executor willing to act the Court will appoint a receiver (s), but the Court will not interfere merely because an executor is poor (t). Possibly now the Probate Court would refuse to grant probate in any case where the Chancery Division would interfere to restrain the executor if probate were granted to him, or where under the Judicial Trustee Act, 1896, the Court would appoint another person to act in his place (u).

Under s. 78 of the Probate Act, 1857 (20 & 21 Vict. c. 77), where the executor at the time of the death of the testator shall be resident out of the United Kingdom, and it shall appear to the Court necessary or convenient by reason of the insolvency of the estate or other special circumstances, the Court may appoint some other person to be administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

An idiot or lunatic is incapable of being executor or

(q) *Ante*, p. 2.

(r) Williams (10th ed.) 162.

(s) *Bowen v. Phillips*, [1897] 1 Ch. 174.

(t) *Howard v. Papern*, (1815) 1

Madd. 142; Williams (10th ed.) 163.

(u) See Williams (10th ed.) 163, n. (g), and the observations of Sir J. Hannen in *In the Goods of Gunn*, (1884) 9 P. D. 242, 244.

Poverty or insolvency no disqualification.

Residence out of the United Kingdom.

Idiot or lunatic.

administrator by reason of his incapacity to accept the office or execute the trust (*x*).

SECT. 2.—*By what words Executor may be appointed.*

Appointment may be express, or constructive.

What is sufficient to constitute an executor according to the tenor.

The appointment of executor may be either express or constructive. In the latter case he is usually called executor according to the tenor; for although no executor be expressly nominated in the Will by the word executor, yet, if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (*y*).

In order to constitute a person an executor according to the tenor of a Will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in the Will (*z*). A direction to pay debts is not indispensable to the appointment of an executor according to the tenor; it is only one of many ways by which the testator may show his intention that the person designated is to act as his executor (*a*).

And inasmuch as no one can assent to a legacy but he that has the management of the estate, a direction to a person to pay legacies constitutes him executor according to the tenor (*b*).

Gift to trustees for specific purpose insufficient.

But a gift to trustees for a specific purpose, with power only to pay what is vested in them as trustees to the particular persons for whose use they hold it, does not constitute them executors according to the tenor, as they have not a general power to receive and pay what is due to and from the estate, which is the office of an executor (*c*).

Direction to pay debts or

So a direction in a Will to a person to pay debts or funeral

(*x*) Williams (10th ed.) 164.

(*y*) *Ibid.* 165.

(*z*) In the Goods of Adamson, (1875) L. R. 3 P. & D. 253; In the Goods of Lowry, (1874) L. R. 3 P. & D. 157, 159; In the Goods of Lush, (1887) 13 P. D. 20.

(*a*) *Re* J. McKane, (1887) 21 L. R. Ir. 1.

(*b*) *Pickering v. Towers*, (1757) 2 Lee, 401.

(*c*) *Baddicott v. Dalzeel*, (1756) 2 Lee, 294; In the Goods of Jones, (1861) 2 Sw. & Tr. 155; In the Goods of Fraser, (1870) L. R. 2 P. & D. 183; In the Goods of Punchard, (1872) L. R. 2 P. & D. 369; In the Goods of Lowry, *ubi sup.*

expenses not out of the general estate but out of a particular fund will not constitute him executor according to the tenor, and the mere fact of the testator saying that the sum of money out of which the debts and funeral expenses are to be paid was all the property he possessed is not sufficient to make it a payment out of the general estate (*d*).

funeral expenses out of a particular fund insufficient.

Where there is a gift of the whole of the testator's property to trustees upon trust to sell and pay funeral expenses and debts and legacies, the gift will constitute them executors according to the tenor. But where, after giving legacies, the testator gave the residue of his property to trustees upon trust to sell and pay funeral and testamentary expenses and debts and other legacies, it was held that the residue was a particular fund and not the general estate, and therefore the trustees were not executors according to the tenor (*e*).

Unless it can be gathered from the terms of the Will that the person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, the Court will not grant probate to him as executor according to the tenor thereof (*f*).

Words must show a duty generally to administer the estate.

Where there is no person named executor, and a person is appointed universal legatee merely, without any directions, it is not the practice to decree probate to him as executor according to the tenor, but he is entitled to administration with the Will annexed (*g*).

Universal legatee, merely, not entitled to probate as executor according to the tenor.

An executor may be appointed by necessary implication as "I will that A. B. be my executor if C. D. will not." So where a man by Will directed that none should have any dealings with his goods until his son came to the age of eighteen years except J. S., by this J. S. was held to be made executor during the minority of the testator's son. So also where a testator, supposing his brother to be dead, by his Will states: "Forasmuch as my brother is dead, I make A. B.

Appointment of executor by necessary implication.

(*d*) In the Goods of Toomy, (1864) 3 Sw. & Tr. 562.

(*e*) In the Goods of Love, (1881) 7 L. R. Ir. 178.

(*f*) In the Goods of Punchard, *ubi*

sup.

(*g*) In the Goods of Oliphant, (1851) 1 Sw. & Tr. 528; In the Goods of Pryse, [1904] P. 301.

my executor," if the brother be alive the brother shall be executor (*h*).

Office cannot be inferred by conjecture.

But the office of executor cannot be inferred by conjecture, as where a testator says: "If my son A. B. marry with C. D. let him not be my executor" (*i*).

Joint probate to executor according to the tenor and express executor.

An executor according to the tenor may be admitted to probate jointly with an executor expressly nominated (*k*).

So also an executor according to the tenor for limited purposes may be admitted to probate with an executor expressly nominated for general purposes (*l*).

Power given to nominate an executor.

A testator may by Will authorise legatees to nominate executors, and probate will be granted to persons nominated by those so authorised (*m*), and a person so authorised may nominate himself (*n*).

So also a testator may empower the survivor of two executors nominated by his Will to appoint another to act with such survivor (*o*); or may direct his executors as such to appoint another to act with them, and if they cannot agree on the appointment they will be entitled to probate with a power reserved for the third person when appointed; but they cannot proceed to nominate until they have themselves obtained probate (*p*).

Executor of sole or last surviving executor.

It has already been stated (*q*) that the executorship is transmissible to the executor of a sole or last surviving executor, and that in such a case no new grant of probate is required (*r*).

Appointment bad for uncertainty.

An appointment of executors may be bad for uncertainty, as where the appointment is of "any two of my sons" (*s*), or "one of my sisters" (*t*).

(*h*) For other instances see Williams (10th ed.) 169.

(*i*) Godolphin, Pt. 3, c. 3, s. 5; and see *In the Goods of Woods*, (1868) L. R. 1 P. & D. 556.

(*k*) *Grant v. Leslie*, (1819) 3 Phillim. 116.

(*l*) *Lynch v. Bellew*, (1820) 3 Phillim. 424.

(*m*) *In the Goods of Cringan*, (1828) 1 Hagg. 548.

(*n*) *In the Goods of Ryder*, (1861) 2

Sw. & Tr. 127; but cf. *Re Sampson*, [1906] 1 Ch. 435.

(*o*) *In the Goods of Deichman*, (1842) 3 Curt. 123.

(*p*) *Jackson v. Paulet*, (1851) 2 Robert. 344.

(*q*) *Ante*, p. 2.

(*r*) See *post*, p. 51.

(*s*) *In the Goods of Baylis*, (1862) 2 Sw. & Tr. 613.

(*t*) *In the Goods of Blackwell*, (1877) 2 P. D. 72.

SECT. III.—*Appointment of Executors in several degrees.*

A testator may appoint several persons as executors in several degrees; as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on. In which case the wife is said to be instituted executor in the first degree, the son is said to be substituted in the second degree, the brother to be substituted in the third degree, and so on (u).

Appointment of executors in several degrees.

The substituted executor cannot propound the Will till the first-named executor has been cited to accept or refuse the office (x).

Substitute cannot propound until after citation.

If an instituted executor once accepts the office, and afterwards dies intestate, the substitutes in what degree soever are all excluded (y).

Acceptance of office excludes all substitutes.

It may be a question of construction whether the substitution was to take place only in the event of the first executor not acting at all, or in the case also of his death after having taken probate (z).

An appointment of A. as executor, and "in case of his absence on foreign duty" of B. as executrix, was held to be an appointment of B. as substituted executor in the event of A.'s absence from the country when the necessity for proving the Will arose, although he was in England at the time of the testator's death (a).

SECT. IV.—*How the appointment may be restricted.*

The appointment of an executor may be either absolute or qualified. It may be absolute when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time. It may be qualified by limitations as to the time, or place wherein, or

Appointment of executor may be absolute or qualified.

(u) Williams (10th ed.) 171.

(x) Smith v. Crofts, (1758) 2 Lee, 557.

(y) Williams (10th ed.) 172.

(z) In the Goods of Lighton, (1828)

1 Hagg. 235; In the Goods of Johnson, (1858) 1 Sw. & Tr. 17; In the Goods of Foster, (1871) L. R. 2 P. & D. 304.

(a) In the Goods of Longford, (1867) L. R. 1 P. & D. 458.

the subject-matter whereon, the office is to be exercised; or the creation of the office may be conditional (*b*).

1. Limitation
in point of
time:

(a) in respect
of commence-
ment;

(b) in respect
of duration.

1. Limitation in point of time—(a) in respect of the commencement of the office, *e.g.*, an appointment of executor to have effect at the expiration of five years after the testator's death; or upon the death or marriage of a particular person, or upon a particular person coming to full age; or the testator may appoint the executor of A. to be his executor, and then if he die before A. he has no executor till A. die;—(b) in respect of the duration of the office, *e.g.*, during five years next after the testator's decease, or during the minority or widowhood or until the death or marriage of a person.

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand or after the period limited for its expiration on the other, the Court may commit administration to another person until there be an executor, or after the executorship is ended (*c*).

2. Limitation
in point of
place.

2. Limitation in point of place—*e.g.*, the testator may appoint different persons executors for properties situate in different counties in England or in different parts of the world (*d*).

Executor ap-
pointed for
abroad only
not entitled to
probate here.

Where, however, a person is appointed executor for a place abroad he is not entitled to probate in this country (*e*), but where the testator has made two Wills with separate executors, one Will relating to property abroad and the other to property in England, probate should be granted here of the two documents as together constituting the Will of the deceased (*f*).

3. Limitation
as to subject-
matter.

3. Limitation as to the subject-matter—*e.g.*, of particular property such as of the testator's plate and household stuff, sheep or cattle, leases, etc. But where a testator, after giving specific legacies, but not disposing of the residue of his personal estate, appointed his daughter executrix for all

(b) Williams (10th ed.) 175.

(c) *Ibid.* 176.

(d) *Re Cohen's Executors and*
London County Council, [1902] 1 Ch.
187.

(e) *Velho v. Leite*, (1864) 3 Sw. &
Tr. 456.

(f) *In the Goods of Harris*, (1870)
L. R. 2 P. & D. 83.

property not named in the Will, the Court refused to grant probate to the daughter as executrix, on the ground that the Court cannot grant probate to an executor who is precluded from dealing with the property which passes under the Will (g).

The same Will may contain the appointment of one executor for general and another for limited purposes (h); but s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing s. 31 of the Conveyancing and Law of Property Act, 1881, does not enable a sole trustee of a Will to appoint by his Will special executors, for the purpose of executing, in continuation to himself, the trusts of the Will of the original testator (i).

But although a testator may appoint separate executors of distinct parts of his property, and may divide their authority, yet *quoad* creditors, they are all to be considered as one executor, and may be sued as one executor (k).

Quoad creditors no distinction between general and limited appointment
4. Conditional.

4. The appointment may be conditional. The condition may be precedent, as for instance on the person nominated giving security to pay the legacies, or on his payment to the other executors of the debts which he owes the testator, or on his proving the Will within a certain time; or the condition may be subsequent, as if the person nominated does some act on the happening of which the appointment is determined or another person is substituted (l).

SECT. 5.—Of the transmissibility of the office of Executor.

If there be a sole executor, whether originally so appointed, or becoming such by survivorship, who proves the Will, the executor of such executor is to all intents and purposes the executor and representative of the first testator. So long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. But if the first executor should die without having proved the Will the executorship is not transmissible to his

Executor of sole executor.

Chain of representation continues until broken by intestacy.
First executor must have proved Will.

(g) In the Goods of Wakeham, (1872) L. R. 2 P. & D. 395.

(h) Lynch v. Bellew, (1820) 3 Phillim. 424.

(i) *Re Parker's Trusts*, [1894] 1 Ch. 707.

(k) Williams (10th ed.) 178.

(l) *Ibid.*

executor, but is wholly determined. Hence it follows that if the person appointed executor dies before the testator there must be administration *cum testamento annexo* (m).

Rule same though original probate limited.

The rule is the same, though the original probate was a limited one (n), but a limited probate formerly taken out to the Will of a married woman did not continue the chain of representation under the general probate of the Will of the original testator (o).

Effect of renunciation :

death before proving :

non-appearance to citation.

Since the stat. 20 & 21 Vict. c. 77, s. 79, where any person renounces probate, his right in respect of the executorship wholly ceases and the representation devolves as if he had not been appointed executor (p); and 21 & 22 Vict. c. 95, s. 16, provides that whenever an executor survives the testator but dies without having taken probate, and whenever an executor is cited to take probate and does not appear to such citation, his right in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if he had not been appointed executor.

Where chain of executorship continues no fresh grant required.

Consequently where an executor to whom power has been reserved survives his acting co-executor and does not appear to a citation the chain of executorship will be continued in the executors of the acting executor without any fresh grant from the Court (q).

Administrator *durante minori etate*.

The administrator of an executor is merely an officer of the Court and has no privity or relation to the original testator. But the administrator *durante minori etate* of the executor of an executor is the representative of the first testator; for such an administrator is *in loco executoris* (r). So also if administration *cum testamento annexo* has been granted under letter of attorney for the use or benefit of another it is

Administrator *cum testamento annexo* as attorney.

(m) Williams (10th ed.) 180 *et seq.*
 (n) In the Goods of Beer, (1851) 2 Robert. 349.
 (o) In the Goods of Bayne (1858), 1 Sw. & Tr. 132.
 (p) *Post*, p. 55.

(q) In the Goods of Noddings, (1860) 2 Sw. & Tr. 15; In the Goods of Lorimer, (1862) 2 Sw. & Tr. 471, 473; In the Goods of Reed, [1896] P. 129.
 (r) Williams (10th ed.) 181.

the same thing as if the executor had proved the Will himself, and the chain of representation remains unbroken (s).

SECT. 6.—Of Renunciation or Acceptance of office.

The executor named in the Will cannot be compelled to accept the office, even though in the lifetime of the testator he had agreed to accept the office (t). Moreover, the Public Trustee if appointed executor is in certain cases prohibited by statute from accepting the office (tt).

Executor cannot be compelled to accept office.

By stat. 21 Hen. VIII. c. 5, s. 8, power was given to the Ordinary to cite the executor to take or refuse probate, which power was transferred to the Court of Probate by s. 23 of the Court of Probate Act, 1857, and is now vested in the Probate Division of the High Court of Justice.

Executor may be cited to accept or refuse probate.

No action will lie for neglect to take out probate; the only remedy is by citing the executor in the Probate Division (u).

No action for neglect to take probate.

By stat. 21 & 22 Vict. c. 95, s. 16, whenever an executor named in a Will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

On non-appearance representation goes as if executor had not been appointed.

If an executor once elects to accept the office he cannot afterwards renounce or refuse probate; and in spite of his renunciation, and the consequent appointment of an administrator, he will remain liable to be sued as executor both at law and in equity (x).

After electing to accept executor cannot renounce:

His renunciation, after intermeddling, being invalid, he will be allowed to retract it and prove the Will, and any appointment of an administrator will be revoked (y).

may retract invalid renunciation.

(s) Williams (10th ed.) 181; In the Goods of Murguia, (1884) 9 P. D. 236.

(t) Doyle v. Blake, (1804) 2 Scho. & Lef. 231, 239.

(tt) 6 Edw. VII. c. 55, s. 2 (4). See Appendix.

(u) *Re Stevens*, [1898] 1 Ch. 162, 177, per Vaughan Williams, L.J.

(x) Williams (10th ed.) 200.

(y) In the Goods of Radenach, (1864) 3 Sw. & Tr. 465.

After inter-meddling may be attached for not taking probate :

Where the executor has intermeddled and will not take upon himself probate of the Will, the Court will issue a citation calling upon him within a time limited to enter an appearance in the registry, and to take upon himself the probate and execution of the Will. In case of disobedience to the citation, the Court will make a peremptory order upon him to take probate within a specified time, and condemn him in the costs, and on failure to comply with the peremptory order the Court will on motion order a writ of attachment to issue to compel him to answer for his contempt (2).

also liable to penalties.

Moreover, stat. 55 Geo. III. c. 184, s. 37, enacts that "if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the Will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds, and also a further sum at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased."

The penalty is now one hundred pounds or double the amount of duty chargeable according as the Commissioners elect, which is a debt due to the Crown, and is recoverable by any of the ways or means in force for the recovery of probate, legacy, or succession duty (a).

What will be deemed an election to accept office.

Whatever acts will make a man liable as executor *de son tort* will be deemed an election of the executorship. Moreover, whatever shows an intention to take upon himself the executorship will be sufficient (b). A statement by him in answer to

(-) Mordaunt v. Clarke, (1868) L. R. 1 P. & D. 592.

v. New York Breweries Co., [1898] 1 Q. B. 205; [1899] A. C. 62.

(a) See 44 Vict. c. 12, s. 40; 57 & 58 Vict. c. 30, s. 8 (1), (5), (6); Att.-Gen.

(b) Long v. Symes, (1832) 3 Hagg. 774.

an inquiry by a creditor, that he is an executor, and that the Will has been proved, will render him liable as an executor (c).

Taking the oath as executor is not to be considered as an intermeddling such as to preclude renunciation (d), but an executor cannot renounce after he has taken probate (e).

Oath as executor does not preclude renunciation.

The present practice is that the executor intending to renounce signs the common form of renunciation in the presence of a witness (f), and the form is then filed in the registry of the Probate Division. It need not be under seal, but if sealed it is liable to 10s. stamp duty (g). A renunciation does not exist as an effective instrument until it has been recorded, and until it is filed it may be withdrawn (h).

Practice as to renouncing.

Until filed renunciation can be withdrawn.

Where the executor is out of England an authority to renounce by power of attorney may suffice (i).

An executor cannot in part refuse. He must refuse entirely or not at all, even in the case of his testator being executor to another person (k).

Executor cannot in part renounce.

Under 20 & 21 Vict. c. 77, s. 79, after renunciation the rights of executorship wholly cease, and the representation of the testator and the administration of his effects shall and may go, devolve, and be committed in like manner as if the person renouncing had not been appointed executor.

After renunciation rights as executor wholly cease.

Under the old law, where all the executors of a Will renounced, and administration had been granted, the renunciation could not be retracted, but where some executors proved and others renounced, those who had renounced were allowed to retract, as they could then be let in without altering the devolution of the representation. The old practice is not abrogated by the above Act, and where one of two executors absconded after taking probate the Court allowed his

When Court will allow retraction of renunciation.

(c) *Vickers v. Bell*, (1864) 10 Jur. (14th ed.) p. 895.

(d) *McDonnell v. Prendergast*, (1830) 3 Hagg. 216; *Long v. Symes*, (1832) 3 Hagg. 774; *Jackson v. Whitehead*, (1821) 3 Phillim. 577; *Mohamidu v. Pitehey*, [1894] A. C. 437, 443.

(e) *In the Goods of Veiga*, (1862) 32 L. J. P. M. & A. 9.

(f) Form No. 247, Tr. & Co. P. P. (14th ed.) p. 202.

(g) *Williams* (10th ed.) 204; *In the Goods of Morant*, (1873) L. R. 3 P. & D. 151.

(h) *In the Goods of Roseer*, (1864) 3 Sw. & Tr. 490.

(i) *Williams* (10th ed.) 204; *Brooke v. Haymes*, (1868) L. R. 6 Eq. 23, 30.

co-executor who had renounced to retract his renunciation and take probate (*l*). The retraction will not be allowed unless it can be shown that it will be for the benefit of the estate or of those interested under the Will (*m*).

A person cannot renounce probate and take administration in another character.

By rule 50, P. R. (Non-Contentious business) "no person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character." But this rule is merely for the guidance of the registry, and is capable of modification by the Court on sufficient reason being shown (*n*).

(*l*) In the Goods of Stiles, [1898] P. L. R. 3 P. & D. 113.
12.

(*m*) In the Goods of Loftus, (1864) 3 Sw. & Tr. 307.

CANADIAN NOTES.

The grant of letters of administration to an infant, though perhaps inexpedient and admittedly contrary to the practice of the Court, is not void, and such letters are at most irregular and are valid until set aside. *Toll v. Canadian Pacific R.W. Co.* (1908), 8 W.L.R. 795.

A grant of probate to an infant executor along with an adult is not a nullity. *Cumming v. Landed Banking and Loan Co.* (1890), 20 O.R. 382. Infant executors.

In Ontario it is enacted that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the Surrogate Judge shall think fit, until such infant shall have attained the full age of twenty-one years, at which period and not before, probate of the will shall be granted to him. The person to whom such administration shall be granted shall have the same powers vested in him as an administrator now has by virtue of the administration granted to him *durante minore ætate* of the next of kin. R.S.O. (1897), c. 337, ss. 3, 4.

A grant of probate exclusively to an infant may be merely voidable. *Toll v. Canadian Pacific R.W. Co.* (1908), 8 W.L.R. 795.

An insolvent is not disqualified from being an executor, but the Court has jurisdiction to interfere with an executor who is insolvent and to order that he be restrained from collecting the assets of the estate and that a receiver be appointed. *Johnson v. Mackenzie* (1890), 20 O.R. 131. See also *Mills v. Pallen* (1898), 1 N.B. Equity R. 601. Insolvents as executors.

By legislation in various provinces in Canada a married woman may accept the office of executrix. Married women.

The authority of an executor is not founded on the probate, but is derived from the will itself. The probate is merely necessary as the proper evidence of the will so far as relates to the executor's title, and the acts of an executor, in selling Executor's acts valid without probate.

goods and otherwise, are perfectly valid without probate and though he should die without taking probate. *Stump v. Bradley* (1868), 15 Gr. 30.

Whatever executors named do, in relation to the effects of the testator, which shews an intention on their part to take upon them the executorship, will amount to an acceptance of the office. As the assets of the testator vest in the executors without probate, any authority that they may exercise in relation to them will be an acceptance of the executorship. *Vannatto v. Mitchell* (1867), 13 Gr. 665.

Various acts which would make executors named in a will liable as having assumed the duty of executors, notwithstanding renunciation, are considered in *Vannatto v. Mitchell, supra*.

An executor without proving the will, has power to do almost all the acts which are incident to his office, and, on the other hand, if he acts, or does not renounce, or make known his intention not to act, he is in general as much disqualified from engaging in any transaction for his own benefit, to the prejudice of those interested in the estate, as if he had taken out probate. *Robinson v. Coyne* (1868), 14 Gr. 561.

Acts
showing
acceptance
of office.

Executors who had not proved the will, had defended an action brought against them as executors, on which judgment had been recovered against them as executors. They, therefore, were held to have accepted the office, and a sale of land under the judgment was held a valid sale. *McDonald v. McDonald* (1890), 17 A.R. 192, 21 S.C.R. 201; see also *Mandeville v. Nicholl* (1859), 16 U.C.Q.B. 609, where executors having confessed judgment were held to have accepted office, although they had not proved the will.

Limitation
of
appointment.

A testator may appoint a person to be his executor for a particular period of time only. *Conron v. Clarkson* (1871), 3 Ch. Ch. 370.

An infant, whether executor or executor *de son tort* is not liable for *devastavit*. *Young v. Purvis* (1886), 11 O.R. 597.

An infant executor, being a minor, is not liable to account. *Nash v. McKay* (1868), 15 Gr. 247.

A special discretion given to an executor and intended by the testator to be personal to the nominated executor, does not continue to one substituted. *Townshend v. Brown* (1890), 22 N.S.R. 423.

An executor of an executor represents the original testator, and is properly proceeded against on a claim against him. *Allen v. Parke* (1866), 17 U.C.C.P. 105. Executor of executor.

After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof. *Cumming v. Landed Banking and Loan Company* (1893), 22 S.C.R. 246. Executor acting as trustee.

A Court of Probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other Court. *Grant v. Maclaren* (1894), 23 S.C.R. 310.

A written renunciation though not sealed, made by one or more executors before the Surrogate, and produced from his office, is sufficient to entitle the remaining executor or executors to act under 21 Henry VIII., c. 4. *Doe dem. Ellis v. McGill* (1841), 8 U.C.Q.B. 224. Renunciation.

As to whether an executor even after taking the oath of office can renounce before probate is actually granted, see *Dini v. Fauquier* (1904), 8 O.L.R. at p. 714.

A legacy to an executor for his trouble and expense is forfeited if he renounce. *Paton v. Hickson* (1877), 25 Gr. 102.

As to an executor retracting his renunciation, the Ontario Act (R.S.O. 1897, c. 59, s. 65) now provides that where a person renounces probate his rights in respect to the executorship "shall wholly cease, and the representation to the testa-

tor and the administration of his effects shall and may without any further renunciation go, devolve and be committed in like manner as if he had not been appointed executor."

This section has not changed the law with respect to the right of the executor to retract a renunciation and he still has the right in a proper case. *Re Phipps* (1907), 9 O.W.R. 982.

In the other provinces of Canada where a similar enactment does not exist, an executor who renounces can at any time before the granting of administration *cum testamento annexo* retract his renunciation. *Travers v. Gustin* (1873), 20 Gr. 106.

As to the effect of previous intermeddling on attempted renunciation. See *Harcourt v. Burns* (1907), 10 O.W.R. 786 and cases cited there.

CHAPTER III.

OF AN EXECUTOR "DE SON TORT."

If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or more usually an executor *de son tort* (a).

What constitutes an executor *de son tort*.

When a man has so acted as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, or by a legatee (b).

Liability of an executor *de son tort*.

The following points were resolved in *Read's case* (c):—

Read's case.

1. "When no one takes upon him to be executor, nor any hath taken letters of administration, there the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts."

Intermeddling must be before rightful executor has taken office, or before grant of administration.

2. "When an executor is made, and he proves the Will, or takes upon him the charge of the Will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right to whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hands; but although there be

Goods taken out of possession of rightful executor are assets in his hands.

(a) Williams (10th ed.) 183.

(b) Williams (10th ed.) 190.

(c) (1600) 5 Rep. 33 b.

Yet stranger expressly claiming to act as executor may be charged as executor *de son tort*.

As to goods taken by stranger before executor has taken office.

Taking possession of foreign assets only not sufficient.

What acts constitute executor *de son tort* is question of law.

Acts of kindness or charity.

Paying debts or testamentary expenses of deceased.

an executor who administers, yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies and intermeddles as executor, there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another executor of right."

3. "In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the Will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which cometh to his hands after he takes upon him the charge of the Will."

Taking possession of foreign assets without taking possession of any of the English assets will not constitute a person executor *de son tort* (d).

The question of fact whether the person charged as executor *de son tort* took possession of effects of the deceased and acted or intermeddled is for the jury; but when the facts are established, the result from them—whether they constitute an executor *de son tort*—is a matter of law for the judge to decide (e).

Although the slightest circumstance of intermeddling will make a person executor *de son tort* (f), yet there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left and defraying the expenses of such funeral himself or out of the deceased's effects, making an inventory of his property, feeding his cattle, repairing his houses, or providing necessaries for his children; for these are offices merely of kindness and charity (g).

A man who pays the debts of the deceased, or the fees about proving his Will, with his own money does not thereby constitute himself executor *de son tort* (h).

(d) *Beavan v. Lord Hastings*, (1856) 2 K. & J. 724.

(e) *Padget v. Priest*, (1787) 2 T. R. 97.

(f) *Williams* (10th ed.) 183; and

see per Buller, J., in *Padget v. Priest*, *ubi sup.*

(g) *Williams* (10th ed.) 187.

(h) *Williams* (10th ed.) 185.

So the giving by the widow of the deceased of a promissory note for the amount of a debt which was owing from the deceased was held not to constitute the widow executrix *de son tort* (i).

A single act of wrong, without proof of acting at the time in the character of executor, is insufficient, as for instance the return of goods sold to the intestate but not paid for on the application of the vendor to the widow of the deceased in satisfaction of his demand (k), or taking or retaining possession of the goods of the deceased under a claim of title (l) or under a mistake as to the ownership (m).

So if a man takes the goods of the deceased and sells or hands them to another, this shall charge the former but not the latter as executor *de son tort*, in the absence of collusion, although the latter acted knowingly (n).

So also a creditor who obtains payment of his debt from an executor *de son tort*, or takes over from him assets of the deceased at a valuation in satisfaction of his debt, does not thereby become executor *de son tort* (o).

So long as there is an executor living who has acted, whether he has proved the Will or not, a person dealing with the goods of the testator as agent of the executor cannot be treated as an executor *de son tort*, but if he continue to act after the death of the sole or last surviving executor he may be so charged (p).

If a person intending to take out administration employs an agent to collect the debts or sell the goods of the deceased, and he does so, and the principal dies before taking out administration, they are both executors *de son tort*. The doctrine that the possession of an agent is the possession of a principal has no application to the case of a wrong-doer (q).

A solitary act of wrong, without proof of acting as executor, is not sufficient.

Nor purchasing or acquiring goods from an executor *de son tort*.

Nor obtaining payment or satisfaction of a debt from an executor *de son tort*.

Agent of executor continuing to act after death of his principal.

Agent of person intending to take administration but dying before doing so.

(i) *Serle v. Wentworth*, (1838) 4 M. & W. 9.

(k) *Mountford v. Gibson*, (1804) 4 East, 441.

(l) *Femings v. Jarrat*, (1795) 1 Esp. N. P. C. 336.

(m) *Williams* (10th ed.) 189.

(n) *Williams* (10th ed.) 188; *Paull v. Simpson*, (1846) 9 Q. B. 365; and

see *Hill v. Curtis*, (1865) L. R. 1 Eq. 90.

(o) *Hursell v. Bird*, (1892) 65 L. T. 709.

(p) *Hall v. Elliott*, (1791) Peake N. P. C. 119; *Sykes v. Sykes*, (1870) L. R. 5 C. P. 113.

(q) *Sharland v. Mildon*, (1846) 5 Hare, 469; *Hill v. Curtis*, (1865) L. R. 1 Eq. 90, 100.

Effect of
grant of ad-
ministration
to executor
de son tort.

After administration has been committed to an executor *de son tort* he may still be charged as executor *de son tort* for the goods previously administered by him (*r*). The relation back of letters of administration exists only for the benefit of the estate by enabling the administrator to recover against those who interfere with it (*s*).

Effect of
43 Eliz. c. 8
in procuring
grant of ad-
ministration
to person of
mean estate
to defraud
creditors.

Under the stat. 43 Eliz. c. 8, a person who procures administration to be granted to a stranger of mean estate and not of kin to the intestate in order by deed of gift or letter of attorney to obtain the estate of the intestate into his own hands to the defrauding of creditors is constituted executor *de son tort* to the extent of any goods so obtained, or any debt released or discharged, without valuable consideration of the value of the same goods or debt or near thereabout (*t*).

Extent to
which execu-
tor *de son tort*
will be pro-
tected.

May plead
*plene adminis-
travit*.

Though an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts, not for his own benefit, which a rightful executor may do. And accordingly, if he pleads properly, he cannot be made liable beyond the extent of the goods which he has administered, and therefore under a plea of *plene administravit* he shall not be charged beyond the assets come to his hands, and in support of the plea he may give in evidence payments by himself of debts of the deceased of equal or superior degree, and even after action brought he may dispose of the assets in discharging a debt of higher degree (*u*).

Delivery of
assets to right-
ful represen-
tative before
action.

An executor *de son tort* can get his discharge from the rightful executor or administrator before action brought, but he cannot discharge himself from the debt of a creditor by delivering over the assets to the rightful executor or administrator after action brought, because the creditor would be in a worse position; he would have to bring a second action against the rightful executor or administrator (*x*).

May prove
settled

The rule in equity is the same; so that if an executor *de*

(*r*) Laury v. Aldred, (1612) 2 Brownl. 185.

(*s*) Morgan v. Thomas, (1853) 17 Jur. 283; and see *post*, p. 194.

(*t*) See Coote v. Whittington, (1873)

L. R. 16 Eq. 534, 544.

(*u*) Williams (10th ed.) 191, 192; Oxenham v. Clapp, (1831) 2 B. & Ad. 309.

(*x*) Oxenham v. Clapp, *ubi sup.* 314; Hill v. Curtis, *ubi sup.*

son tort can prove a settled account with the rightful representative before suit, it is a sufficient answer to an action against him for an account (y).

account with
rightful repre-
sentative
before action.

Although an executor *de son tort* is liable at the suit of a creditor to an account in equity for such assets as it is alleged he has received, he is not liable to a general account unless he has received everything (z).

Not liable to
general
account
unless he has
received
everything.

In an action for a debt of the testator the lawful executor may be joined in the action against the executor *de son tort*, or they may be sued severally, but a lawful administrator cannot be so joined (a).

Lawful execu-
tor may be
sued jointly
with executor
de son tort :
verna,
administrator.

An executor *de son tort* cannot retain for his own debt, otherwise every creditor of the deceased would contend to make himself executor of his own wrong to satisfy himself by retainer (b).

He cannot
retain for his
own debt.

Nor can he retain though he be a creditor of a higher degree (c). But if he afterwards, even *pendente lite*, obtains administration, he may retain (d).

If the rightful executor or administrator bring an action of trover or trespass against the executor *de son tort*, the latter may give in evidence in mitigation of damages payments made by him in the rightful course of administration (e). But this recouping in damages can only be allowed to the executor *de son tort* in cases where there are sufficient assets to satisfy all the debts of the deceased ; for otherwise the rightful executor or administrator would be precluded not only from giving preference to one creditor over others of equal degree, which is one of the privileges of his office, but also from satisfying his own debt in priority to all those of equal degree by way of retainer (f).

Against right-
ful repre-
sentative he may
give in evi-
dence pay-
ments in due
course of ad-
ministration ;
but only if
assets suffi-
cient to satisfy
all debts.

Where the executor *de son tort* is really acting as executor in the due course of administration, and the party with whom

Transactions
in good faith.

(y) Hill v. Curtis, *ubi sup.*

(z) Coote v. Whittington, (1873) L. R. 16 Eq. 534.

(a) Williams (10th ed.) 191.

(b) Coulter's Case, (1599) 5 Co. 30 a ; and see Oxenham v. Clapp, (1831) 2

B. & Ad. 309, 313.

(c) Curtis v. Vernon, (1790) 3 T. R. 587.

(d) Williams (10th ed.) 193.

(e) See *post*, p. 141.

(f) Williams (10th ed.) 195.

he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property (g).

May plead
Statute of
Limitations.

An executor *de son tort* is entitled to plead the Statute of Limitations (h).

Cannot be
compelled to
take grant of
administra-
tion.

Although an executor after an act of administration cannot refuse to accept the executorship and take probate, yet an executor *de son tort* cannot be compelled to take a grant of letters of administration (i).

Liability of
his executor
on original
contracts.

The executor of an executor *de son tort* is not liable for a breach of contract committed by the person with whose property the executor *de son tort* has intermeddled (k).

Liability of
infant.

It has been held that an infant cannot be made liable to account where he has acted as administrator under an improper grant to him (l), nor where being appointed executor he has acted but never proved the Will on coming of age (m); but where a breach of trust has been committed by an infant connected with his proceedings as to the estate, an inquiry should be directed as to all the circumstances, since there may be circumstances under which he might be made liable for moneys received by him, though received before he came of age (n).

(g) *Thompson v. Harding*, (1853) 18 Jur. 58; see *post*, p. 141.

(h) *Webster v. Webster*, (1804) 10 Ves. 93; *Doyle v. Foley*, [1903] 2 L. R. 95.

(i) *Williams* (10th ed.) 347.

(k) *Wilson v. Hodson*, (1872) L. R.

7 Ex. 84.

(l) *Hindmarsh v. Southgate*, (1827)

3 Russ. 324.

(m) *Stott v. Meanock*, (1862) 31 L. J. Ch. 746.

(n) *Re Garnes*, (1885) 31 C. D. 151.

CANADIAN NOTES.

Whether a party has made himself an executor *de son tort* is a mixed question of law and fact. When the facts are established, the question whether they constitute him an executor *de son tort* is a matter of law for the Judge to decide. *Haacke v. Gordon* (1840), 6 U.C.R. 424, following *Padget v. Priest*, 2 T.R. 97, cited *ante* p. 58.

An action will not lie against one as executor *de son tort*, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased. *Armstrong v. Armstrong* (1879), 44 U.C.R. 615.

The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor *de son tort*. *Merchants Bank v. Monteith* (1885), 10 P.R. 467.

Any dealing with the goods of a deceased person by which the party so dealing assumes to exercise a control over the goods, is evidence against him as executor *de son tort*. *Powell v. Wathen* (1862), 10 N.B.R. 258. Evidence.

If property held by an executor *de son tort* has been disposed of by him and the proceeds invested, the beneficial owners may follow the substituted property into the hands of a third person not a purchaser for value without notice. *Dunlop v. Dunlop* (1894), 1 Equity N.B.R. 72.

The rule that where an executor takes the testator's goods on a claim of property in them himself, although it afterwards appears he had no right, such claim being expressive of a different purpose from that of administration as executor, is also applicable to the case of a person taking the goods of a deceased person under a fair claim of title, such person though he may not be able to establish his title completely is not liable to be charged as an executor *de son tort*. *Merchants Bank v. Monteith* (1884), 10 P.R. at p. 475.

In an action charging a person as executor *de son tort* by meddling with the goods of the deceased, a declaration of the deceased while in possession, that the goods did not belong to him, is evidence for the defendant. *Powell v. Wathen* (1862), 10 N.B.R. 258.

Statute of
Limitations.

Where an executor *de son tort* is sued by an administrator time runs only from the grant of administration. *Dunlop v. Dunlop* (1894), 1 Equity N.B.R. 72.

An executor *de son tort* cannot, by giving a confession of judgment, or making payments on account of a debt, or by any other act of his give a new start to the Statute of Limitations as against the rightful administrator, or the parties beneficially interested in the estate. *Grant v. McDonald* (1860), 8 Gr. 468.

The wife of a grocer and liquor dealer who continues after his death to keep the house open and sell liquors left therein at his decease is made thereby an executrix *de son tort* and cannot protect herself under the plea of *ne unques* executrix against a demand by a simple contract creditor of her husband, by shewing that there was an outstanding judgment against her husband for an amount exceeding all the assets of the estate. *Keith v. Parks*, 2 Kerr N.B.R. 552.

Infants.

An infant whether executor or executor *de son tort* is not liable for *devastavit*. *Young v. Purvis* (1886), 11 O.R. 597.

Parties to
action.

An executor *de son tort* sold property and invested the proceeds in land, and conveyed it to his daughter by a deed to which his wife was not a party. After his death a suit was brought against the widow and daughter to have the land charged with the trust affecting the original property, and it was held that the widow was properly joined in the suit. *Dunlop v. Dunlop* (1894), 1 Equity N.B.R. 72.

A woman after the death of her husband ordered goods from defendants and used the goods in continuing the business which had been carried on by the husband, and, out of the proceeds of the goods sold, remitted money to defendants and sent them other goods. Defendants filed their claim

against the estate without crediting the money or goods so sent. In an action by the woman for goods sold and money paid it was held that defendants would have been justified in treating the widow as executrix *de son tort*, but not having done so, and she as a matter of fact not having acted as executrix *de son tort* when the payments were made, could recover. *Dart v. Davidson* (1894), 26 N.S.R. 220.

In an action by a creditor against an executrix *de son tort*, she cannot set off a debt due from the plaintiff to her testator. *Cameron v. Cameron* (1873), 23 C.P. 289.

A single act of wrong in taking the goods of the intestate is sufficient to make a party an executor *de son tort* in respect of creditors who may choose to sue him in that character. *Green v. Clark* (1907), 3 E.L.R. 349.

An executor *de son tort* is not within the meaning of Jurisdiction. R.S.O., c. 60, s. 72(d), giving enlarged jurisdiction to Division Courts when the amount is ascertained by the signature of the person whom, as executor or administrator, the defendant represents, and a Division Court has no power in the same proceeding to declare a defendant executor *de son tort* and pronounce judgment against him as such for the amount claimed. *Re Day v. McGill* (1906), 10 O.L.R. 408.

Real estate cannot be sold in Ontario under an execution obtained against an executor *de son tort*. *McDade v. Dafoe*, 15 U.C.R. 386, 391. But a sale of the reversion of a term of years under a *fi. fa.* against an executor *de son tort* is good. *Bain v. McIntyre*, 17 C.P. 500.

An action will not lie against one as executor *de son tort*, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased. *Armstrong v. Armstrong* (1879), 44 U.C.R. 615.

Payments made to an executor *de son tort* form no defence to an action by the executor. *Hunter v. Wallace* (1856), 13 U.C.R. 385.

Chapter 337, s. 16, R.S.O. (1897), provides that "the executors and administrators of any person who, as executor in his own wrong, or as administrator, shall waste or convert any goods, chattels, estate or assets of any person deceased, to his own use shall be liable and chargeable in the same manner as their testator or intestate would have been if he had been living."

CHAPTER IV.

WHAT THE EXECUTOR MAY DO BEFORE PROBATE.

SINCE the executor derives all his interest from the Will itself, and the property vests in him from the moment of the testator's death, and the probate is merely the authenticated evidence of his title, it follows he may do almost all the acts which are incident to his office, except only some of those which relate to suits. He may take possession of and sell, assign, and dispose of the testator's effects, pay or release debts, and may distrain for rent due to the testator. He may also assent to, or pay, legacies, and the assent is good though he die before probate. So all payments made to him are good, and shall not be defeated though he dies and never proves the Will (a).

What executor may do before probate.

But although an executor may before probate by assignment of a term for years or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee, yet, if it be necessary to support that title by showing the right to make the assignment, or give the assent, this can only be effected by producing the probate, or should the executor die after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead (b). Again, although an executor can before probate make an assignment and give a receipt for purchase money, yet a purchaser is not bound to pay the purchase money till probate, because till the evidence of title exists the executor cannot give a complete indemnity (c), as a Will of late date might be found, or probate might be refused on the ground that it was made under undue influence.

Production of probate to support title of assignee, or specific legatee.

Purchaser not bound to pay purchase money without production of probate.

(a) See Williams (10th ed.) 220 et seq. 516.

(b) Williams (10th ed.) 221; and see Johnson v. Warwick, (1856) 17 C. B.

(c) Williams (10th ed.) 222; and see Newton v. Metropolitan Railway Co., (1861) 1 Dr. & Sm. 583.

Executor cannot maintain action in representative character without production of probate.

An executor cannot maintain (*i.e.*, prosecute to a successful conclusion) actions before probate unless such as are founded on his actual possession; for in actions where he sues in his representative character he may be compelled, by the course of pleading, to produce the letters testamentary at the trial, or in some cases by an application to the Court at an earlier stage of the cause; and in those actions where he sues in his individual capacity, relying on his constructive possession as executor (*i.e.*, the possession in law arising from the property in the goods), although he does not name himself as executor, yet, generally speaking, it will be necessary for him to prove himself executor at the trial, which he can only do by showing the probate (*d*).

Proceedings may be stayed at instance of defendant until production of probate.

Although the executor suing as such may commence the action before probate, yet if the defendant does not dispute the plaintiff's title, and is ready to pay what is claimed on production of the probate, the Court will on the defendant's application stay proceedings until production of probate, and thus prevent needless costs being incurred (*e*).

Presentation of petition in bankruptcy, or to wind up company, before probate.

So also an executor of a creditor before probate can present a petition in bankruptcy (*f*), or a winding-up petition under the Companies Act (*g*), but he must obtain probate before the hearing of the petition.

Creditor of deceased debtor cannot sue executor until executor has inter-meddled or proved.

A creditor of a deceased debtor cannot sue a person named as executor in the Will of the deceased unless he has either administered, that is, intermeddled with the assets, or proved the Will, and consequently the seizure and sale of part of the testator's assets under an execution founded on a judgment in a suit, where the executor had neither administered nor proved, was held to be ineffectual to bind the testator's estate (*h*).

(*d*) Williams (10th ed.) 222; and see Smith v. Milles, (1786) 1 T. R. 475, 480.

(*e*) Webb v. Adkins, (1854) 14 C. B. 401; Tarn v. Commercial Bank of Sydney, (1884) 12 Q. B. D. 294.

(*f*) Rogers v. James, (1816) 7 Taunt.

147; *Ex parte Paddy*, (1818) 3 Madd. 241.

(*g*) *Re* Masonic & General Life Assurance Co., (1886) 32 C. D. 373.

(*h*) Mohamidu v. Pritchey, [1894] A. C. 437.

CANADIAN NOTES.

The authority of an executor is not founded on the probate, but is derived from the will itself. The probate is merely necessary as the proper evidence of the will as far as relates to the executor's title, and the acts of an executor, in selling goods and otherwise, are perfectly valid without probate, and though he should die without taking probate. *Stump v. Bradley* (1868), 15 Gr. 30.

Executor's
acts valid
without
probate.

Whatever executors named do, in relation to the effects of the testator, which shews an intention on their part to take upon them the executorship, will amount to an acceptance of the office. As the assets of the testator vest in the executors without probate, any authority that they may exercise in relation to them will be an acceptance of the executorship. *Vannatto v. Mitchell* (1867), 13 Gr. 665.

An executor without proving the will has power to do almost all the acts which are incident to his office, and, on the other hand, if he acts, or does not renounce, or make known his intention not to act, he is in general as much disqualified to engage in any transaction for his own benefit, to the prejudice of those interested in the estate, as if he had taken out probate. *Robinson v. Coyne* (1868), 14 Gr. 561.

Executors who had not proved the will, defended an action brought against them as executors, on which judgment was recovered against them as executors. They, therefore, were held to have accepted the office, and a sale of land under the judgment was held a valid sale. *McDonald v. McDonald* (1890), 17 A.R. 192, 21 S.C.R. 201. See also *Mandeville v. Nicholl* (1859), 16 U.C.Q.B. 609, where executors having con-

fessed judgment were held to have accepted office, although they had not proved the will.

The title of an executor being derived from the will and not from the probate, the Court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate. *Stump v. Bradley* (1868), 15 Gr. 30.

Origin of
Probate
Courts.

See also the judgment of Draper, C.J., in *Grant v. Great Western Ry. Co.* (1877), 7 C.P. 438, where an historical statement of the origin and general jurisdiction of the probate Courts in this country and a complete collection of cases down to that date are furnished.

CHAPTER V.

OF PROBATE.

SECT. 1.—*Jurisdiction of the Probate Division of the High Court.*

At the time of the passing of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the Ecclesiastical Court was the only Court in which the validity of Wills of personalty could be established or disputed, except in the case of certain Courts Baron that had had probate of Wills time out of mind. The Court of the Ordinary of the place wherein the testator dwelt (generally speaking the bishop of the diocese) was the regular Court of Probate. Certain districts, however, were exempt from this jurisdiction and were called Peculiars, because they had a peculiar and special Ordinary of their own. If the deceased, at the time of his death, had effects to such an amount as to be considered notable goods, usually called *bona notabilia*, within some other diocese or peculiar than that in which he died, then the Will must have been proved before the Metropolitan of the province by way of special prerogative; whence the Courts where the validity of such Wills were tried, and the offices where they were registered, were called the Prerogative Courts and the Prerogative Offices of Canterbury and York (a).

Jurisdiction to grant probate. Prior to the Court of Probate Act, 1857.

By s. 3 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the jurisdiction of Ecclesiastical and other Courts to grant or revoke probate of Wills was abolished, and by s. 4 of the same Act became vested in the Court of Probate. By s. 28 the Court of Probate was constituted a Court of Record with the same powers in relation to the personal estate in all parts of England of deceased persons as

Under the Court of Probate Act, 1857.

(a) See Williams (10th ed.) 208, 209.

the Prerogative Court of the Archbishop of Canterbury then had in the province of Canterbury in relation to those matters and causes testamentary and those effects of deceased persons which were within its jurisdiction; provided that no suits for legacies, or suits for the distribution of residue, should be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary was thereby abolished. And by s. 29 the practice of the Court of Probate, except where otherwise provided by the Act, or by the rules or orders to be made under it, was, so far as the circumstances of the case would admit, to be according to the then practice of the Prerogative Courts.

Under the
Judicature
Act, 1873.

After 1st November, 1875, by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 3, 16, the Court of Probate became part of and its jurisdiction was transferred to the High Court of Justice, and by s. 34 all causes and matters which would have been within the exclusive cognisance of the Court of Probate if the Act had not passed were assigned to the Probate, Divorce and Admiralty Division of the High Court.

Application
of rules and
orders of
Court of Pro-
bate.

Sect. 18 of the Judicature Act, 1875 (38 & 39 Vic. c. 77), provides that the rules and orders of the Court of Probate are to remain in force until altered or annulled by any rules of Court made after the Act of 1875, and the president of the Probate Division shall have with regard to non-contentious or common form business the powers conferred on the judge of the Probate Court by s. 30 of the Court of Probate Act, 1857. The rules and orders of the Court of Probate have not been abrogated, consequently the rules and orders under the Judicature Act do not apply in non-contentious business, but they apply to contentious business where not inconsistent with the rules and orders of the late Court of Probate, or where they contain any new provisions as to probate practice (*b*).

Extent to
which R.S.C.
apply.

Rules and orders under the provisions of the Court of Probate Acts, 1857 and 1858, have from time to time been made, and those now in force in non-contentious business for the

(*b*) See *In the Goods of Tomlinson*, Caspari, (1897) 75 L. T. 663; *Druce v.* (1881) 6 P. D. 209; *In the Goods of Young*, [1899] P. 84, 101.

Principal and District Probate Registries are the Rules and Orders of 1862, 1866, 1871, 1873, 1887, 1892, 1894, 1896, and 1897, and in addition for the District Registries the Rules and Orders of 1863 and 1871; and in contentious business the Rules and Orders of 1862, 1865, and 1874 (c).

As long as the Ecclesiastical Courts had exclusive testamentary jurisdiction they were also Courts of Construction as well as Courts of Probate (d), but the new Court of Probate is not a Court of Construction, since by s. 23 of the Act of 1857 it is prohibited from entertaining suits for legacies or for the distribution of residue. By s. 34 of the Judicature Act, 1873, all causes and matters for the administration of the estates of deceased persons, and for the execution of trusts, are assigned to the Chancery Division of the High Court. It is, however, sometimes necessary for the Probate Division to construe the Will in order to determine who is entitled to the grant of administration (e).

Court of Probate not a Court of Construction.

Formerly, under stat. 25 Hen. VIII. c. 19, appeals in matters testamentary were to the Court of Delegates, who were appointed by commission issued to both judges and civilians. The power of this Court was by 3 & 4 Will. IV. c. 92 transferred to the Judicial Committee of the Privy Council, and by s. 39 of the Court of Probate Act, 1857, to the House of Lords. Now, since the Judicature Act, 1875, appeals from the Probate Division are to the Court of Appeal.

Jurisdiction on appeals.

Sect. 2.—*Jurisdiction of the County Court.*

By 21 & 22 Vict. c. 95, s. 10, where it appears that the personal estate of the deceased without deducting debts was at the time of his death under the value of £200, and the deceased was not entitled beneficially to any real estate of the value of £300 or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have

Co-ordinate jurisdiction in contentious proceedings where personal estate is under £200 and real estate does not exceed £300 in value.

(c) For these rules and orders see Tr. & Co. P. P. (14th ed.).

(d) Williams (10th ed.) 215.

(e) See In the Estate of Lupton, [1905] P. 321.

the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the Will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.

Judge of Probate Division may remit to County Court any contentious matter within the County Court jurisdiction.

By s. 59 of 20 & 21 Vict. c. 77, it is not obligatory to apply for probate or administration to any district registry, or through any County Court; but in any contentious matter the judge of the Probate Division may send any cause within the contentious jurisdiction of a County Court to such County Court to be proceeded with there. And by s. 12 of 21 & 22 Vict. c. 95, the jurisdiction under s. 59 of the previous Act is extended to an application for the revocation of a grant of probate or administration as well as to an application for any such grant (f).

Appeal from County Court.

An appeal lies from the determination of the judge of the County Court to a Divisional Court of the Probate Division of the High Court (g).

SECT. 8.—*Jurisdiction of District Registries.*

District registrars may grant probate or letters of administration in common form.

By s. 18 of the Court of Probate Act, 1857, district registries under the control of the Court of Probate were established throughout England and Wales in the several places mentioned in Schedule A to the said Act. And s. 46 of the Act authorises probate of a Will or letters of administration to be granted in common form by the district registrar if it shall appear by affidavit of some or one of the applicants that the testator or intestate at the time of his death had a fixed place of abode within the district. The district registrar is prohibited by s. 48 from making any grant where there is contention as to the grant, or where it appears to him that probate or administration ought not to be granted in common form.

Notice to be transmitted to principal registry.

The Act also provides (s. 49) for transmission to the principal registry of notice of every application to any district

(f) As to the practice in contentious business in the County Court see County Court Rules, 1889, Ord. XLIX.

(g) 20 & 21 Vict. c. 77, s. 58; R. S. C., Ord. 59.

registry, and no probate or administration shall be granted in pursuance of such application until after certificate from the principal registry that no other application appears to have been made in respect of the goods of the same deceased person. It also makes provision (s. 51) for transmission of lists of probates and administrations and certified copies of Wills to the principal registry, and (s. 52) for the safe custody of original Wills.

No grant to be made until after certificate from principal registry.

Lists to be transmitted.

It is not obligatory to apply to any district registry for probate or administration in common form, but in every case the application may be made through the principal registry (s. 59) (h).

Not obligatory to apply to district registry.

SECT. 4.—*Manner of obtaining probate.*

The only person to whom probate of the Will can be granted is the executor named in it either expressly or according to the tenor.

Before any citation can issue in respect of a Will to accept or refuse probate the Will must be filed (i).

Will must be filed before citation.

By the Court of Probate Act, 1857, s. 26, the Court may in a summary way order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court or upon interrogatories respecting the same, and he shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court,

Court may order any testamentary paper to be brought into the registry:

or direct any person to attend to be examined as to his knowledge respecting any testamentary paper.

(h) And see P. R., 1862, r. 1; D. R., 1863, r. 1.

(i) Tr. & Co. P. P. (14th ed.) 259.

Costs in the discretion of the Court.

Registrar may issue subpoena for production.

Solicitor has no lien on original Will for costs.

All testamentary papers should be brought into the registry.

Provision for preservation of original Wills, and for obtaining official copy of the whole or any part of a Will, or certificate of grant of letters of administration.

Provision for depositing Wills of living persons.

and had made such default; and the costs of any such proceeding shall be in the discretion of the Court.

Further, by s. 23 of 21 & 22 Vict. c. 95, the registrar of the principal registry may issue a subpoena requiring any person to produce and bring into the principal or any district registry any paper or writing being or purporting to be testamentary, and such person shall be subject to the like process of contempt in case of default as under an order of the Court.

A solicitor has not any lien on a Will which he has made for his client, since he engages to make the instrument effectual for the purposes of the testator, which it cannot be unless it is produced elsewhere (*k*).

All testamentary papers should be brought into the registry. Practitioners have no right to keep Wills of deceased persons in their possession (*l*); and where a Will after the death of the testator has been delivered to a solicitor by his client, the solicitor has not any privilege whatever in the matter, as the Will does not belong to the client, but to the Court, and the solicitor will be ordered to lodge it in the probate registry (*m*).

A motion to attach a person for not complying with an order made under s. 26 of the Probate Act, 1857, directing his attendance for cross-examination as to his knowledge of any testamentary paper will be refused unless it is shown that his conduct money has been paid or tendered (*n*).

The Court of Probate Act, 1857 (ss. 66—69), makes provision for the deposit and preservation of all the original Wills brought into the Court, or of which probate, or administration with the Will annexed, is granted, in the principal or district registries, and for obtaining an official copy of the whole or any part of a Will, or an official certificate of the grant of any letters of administration from the registry where the Will has been proved or the administration granted.

Sec. 91 of the same Act also provides for safe and convenient depositories under the control of the Court for Wills

(*k*) *Lord v. Wormleighton*, (1822) Jac. 580, 581, per Ld. Eldon.

(*l*) *Williams* (10th ed.) 231.

(*m*) *In the Estate of Harvey*, [1907] P. 239.

(*n*) *Ibid.*

of living persons who may deposit them, upon payment of fees.

By Probate Rules, 1862, r. 48, "no probate or letters of administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars."

When probate or letters of administration may issue.

And by rule 45, "in every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit."

If a death cannot be proved recourse must be had to the presumption of law, that is, it may be presumed that a man is dead at the expiration of seven years from the time he was last known to be living (*o*). There is, however, no legal presumption as to the date of the death (*p*), nor of death without issue (*q*).

When death may be presumed.

No legal presumption as to the date of death.

Those who found a right upon a person having survived a particular period (*r*), or having died without issue (*s*), must establish that fact affirmatively by evidence. Where husband and wife executed identical Wills, each appointing the other universal legatee and sole executor, and substituting executors in case of the other dying first, and both were lost in the same ship, and there was no evidence that either of them survived the other, the Court made a grant of administration with the Will annexed of the estate of each to one of the next-of-kin of each, as in case of an intestacy (*t*).

(*o*) *Doe v. Jeason*, (1805) 6 East, 80, 85; *Doe v. Nepean*, (1833) 5 B. & Ad. 86; *S. C.* in error, (1837) 2 M. & W. 894.

(*p*) *Doe v. Nepean*, *ubi sup.*; in the Goods of Smith, (1861) 2 Sw. & Tr. 508.

(*q*) *Re Jackson*, [1907] 2 Ch. 354.

(*r*) *Re Phene's Trust*, (1869) L. R. 5 Ch. 139, 152; In the Goods of Nicholls, (1872) L. R. 2 P. & D. 461; *Re Aldersey*, [1905] 2 Ch. 181.

(*s*) *Re Jackson*, *ubi sup.*

(*t*) In the Goods of Alston [1892] P. 142.

A testament may be proved in two ways : either in Common Form or in Solemn Form.

Proof in common form.

A Will is proved in common form when the executor presents it before the judge and, in the absence of, and without citing, the parties interested, produces witnesses to prove the same; who testifying by their oaths that the testament exhibited is the true, whole, and last Will and testament of the deceased, the judge thereupon, and sometimes upon less proof, annexes his probate and seal thereto (*u*).

Attestation clause being regular, oath of executor alone sufficient.

If the Will be perfect on the face of it, and there is an attestation clause referring to the solemnities required by the statute 1 Vict. c. 26, s. 9, as having been complied with, probate in common form may be obtained upon the oath of the executor alone (*x*).

Otherwise affidavit from one of the attesting witnesses requisite.

But if there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed formalities, an affidavit is required from one of the subscribing witnesses, by which it must appear that the Will was executed in compliance with the statute (*y*).

Or other evidence of due execution.

If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the Will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution (*z*).

Procedure if Will not properly attested.

By Probate Rules, 1862, r. 6, if on perusing the affidavits it appear doubtful whether the Will or codicil has been duly executed, the registrars may require the parties to bring the matter before the judge on motion.

Where the signature of the testator and the attestation clause are on the face of the Will regular, the Court will not on affidavit of irregularity decree administration to pass to the

(*u*) Williams (10th ed.) 238.

(*x*) *Ibid.*, 239.

(*y*) *Ibid.*; P. R., 1862, r. 4.

(*z*) P. R., 1862, r. 7; for forms of affidavits see Tr. & Co. P. P. (14th ed.) pp. 768 *et seq.*

effects of the deceased as dead intestate unless the Will has been propounded (a), even on the consent of all parties (b).

Probate Rules, 1862, rr. 9, 10, and 11, give directions as to what affidavits shall be required to prove that interlineations or alterations, erasures, and obliterations existed in the Will before its execution.

As to proving interlineations or alterations.

Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the Will fair, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the Will may be affected by the appearance of the original paper, the Court will order the probate to pass in *fac simile*. A *fac simile* probate is conclusive in the Courts that the Will was at its execution in the state in which it appears in the probate (c).

How probate copy is engrossed.

Where there are two Wills, and the later Will betrays on the face of it insanity, if after citation the persons cited decline to propound it and consent to probate of the earlier Will, probate of the earlier Will will be granted in common form (d).

Later of two Wills betraying insanity, after citation, probate in common form may be granted of the earlier.

By Probate Rules, 1897, r. 109, "All rules, orders and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897."

Practice of non-contentious business as to grants under the Land Transfer Act, 1897.

The proof of Wills in solemn form is part of the "contentious business" of the Probate Division, and is commenced by the issue of a writ of summons in an action, which is substituted for suit by citation in the Court of Probate (e). But the old practice is retained of giving notice by citation to any interested party of an action pending for the purpose of binding them by the judgment of the Court (f).

Proof in solemn form (contentious business), by issue of writ in an action.

Parties interested must be cited.

(a) In the Goods of Ayling, (1838) 1 Curt. 913.

(b) In the Goods of Watts, (1837) 1 Curt. 594.

(c) Gann v. Gregory, (1854) 3 De G. M. & G. 777; and see Williams (10th ed.) 240.

(d) Palmer v. Dent, (1850) 2 Robert. 284.

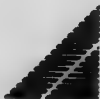
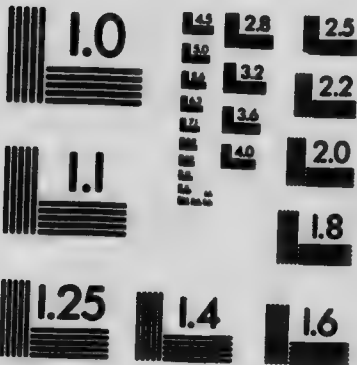
(e) See R. S. C., 1883, Ord. 1, r. 1.

(f) See R. S. C., Ord. 16, r. 10; Williams (10th ed.) 241; Tr. & Co. P. P. (14th ed.) pp. 257 et seq.



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Executor proving in common form may be compelled to prove in solemn form within 30 years.

The difference between probate in common form and in solemn form, with respect to citing the parties interested, works this diversity of effect, viz., that the executor of the Will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form, so that if the witnesses be dead in the meantime it may endanger the whole testament, but a testament once proved in solemn form, the executor cannot be compelled to prove it again. Hence, not only are Wills proved in solemn form at the instance of persons who desire to invalidate them, but the executor himself may, and in prudence often does, for greater security, propound and prove the Will in the first instance in solemn form (g), and is entitled to deduct his costs of so doing out of the estate (h).

Procedure if executor doubts validity of codicil.

If the executors doubt the validity of a codicil they should not cite the asserted legatees under the codicil to propound the codicil, but they should proceed to prove the Will in solemn form, and cite the next-of-kin and asserted legatees under the codicil to see the Will proved (i).

Procedure for putting executor to proof in solemn form after proof in common form.

Where an executor has proved the Will in common form, a party desirous of putting him to proof in solemn form commences an action for revocation, having first cited the executor to bring in the probate. If the executor desires to sustain the Will, he must either plead and propound it in the action for revocation, or he must commence an action himself to obtain proof in solemn form (k).

Next-of-kin entitled to call for proof in solemn form.

The next-of-kin, as such merely, are entitled to call for proof in solemn form of the deceased's Will, of common right; and the mere acquiescence of a next-of-kin to the probate being taken in common form is no bar to the exercise of this right, even though he has received a legacy as due to him under the Will (l). But before a legatee who has received all

(g) Williams (10th ed.) 242.

(h) Burls v. Burls, (1868) L. R. 1 P. & D. 472, 476.

(i) In the Goods of Benbow, (1862) 2 Sw. & Tr. 488; In the Goods of Chamberlain, (1867) L. R. 1 P. & D.

316; and see *post*, p. 138.

(k) Williams (10th ed.) 243; *post* p. 138.

(l) *Ibid.*; as to what amounts to waiver see *Goddard v. Smith*, (1872) L. R. 3 P. & D. 7.

or part of his legacy can be permitted to dispute the Will, he must bring into Court the amount of the legacy paid to him to abide the event of the suit (*m*).

A next-of-kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between the executor and another next-of-kin, ending in the establishment of the Will, is not at liberty in any way to oppose probate being taken (*n*), but this rule does not apply where the decree is founded on a compromise between the contesting parties (*o*). It is not necessary in the Probate Court that a person should be a party to a suit in order that he should be bound by the results. If he is privy to the proceedings it is sufficient. But a compromise is an agreement by which he is not bound unless a party to it (*p*).

A legatee, having renounced administration *cum testamento annexo*, is not barred from contesting the validity of the Will (*q*).

A legatee cannot set up a Will after it has been litigated between the executor and next-of-kin, or between the executor and the executor of another Will, and pronounced against, unless he can show the parties agreed to set aside the Will by fraud or collusion. But he may intervene for his interest pending the suit, but apparently not after the hearing (*r*).

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to enable a person to oppose a testamentary instrument (*s*).

Though a next-of-kin may, as such, oppose all the testamentary papers, he has not a right to oppose any particular one he may think fit, for some interest in it, however remote, is necessary (*t*).

A creditor cannot controvert the validity of a Will; for it

But next-of-kin, privy to proceedings and not intervening, cannot afterwards oppose probate, unless decree is founded on a compromise by which he is not bound.

Renunciation of administration *c. t. a.* no bar to contesting Will.

Legatee cannot set up Will after it has been pronounced against: but may intervene pending suit.

Slightest interest sufficient to oppose Will.

Creditor cannot contest Will,

(*m*) Williams (10th ed.) 245.
 (*n*) Ratcliffe v. Barnes, (1862) 2 Sw. & Tr. 486.
 (*o*) Wytcherley v. Andrews, (1871) L. R. 2 P. & D. 327.
 (*p*) *Ibid.*; and see Meccredy v. Brown, (1906) 2 I. R. 437.
 (*q*) Gascoyne v. Chandler, (1755) 2

Lee 241.
 (*r*) Williams (10th ed.) 246; Peters v. Tilley, (1886) 11 P. D. 145.
 (*s*) Dixon v. Allinson, (1864) 3 Sw. & Tr. 572.
 (*t*) Williams (10th ed.) 246; Baskcomb v. Harrison, (1849) 2 Robert. 118.

is indifferent whether he receive his debt from an executor or an administrator; but when administration has been granted to a creditor, he may oppose a Will the same as the next-of-kin (u).

unless administration has been granted to him.
Probate not granted of Will pending litigation as to validity of codicil.

Probate of a Will cannot be granted to the executor while a contest subsists about the validity of a codicil; for that being undetermined, it does not appear what is the Will, and the executor cannot take the common oath (x). But where a question arose as to the validity of a codicil revoking the appointment of a co-executor, and the estate required an immediate representative, probate of the undisputed instruments was granted to the other executor, with consent of the co-executor, reserving all questions (y).

What is the probate.

When a Will is proved the original is deposited in the registry, and a copy thereof on parchment is made out under the seal of the Court and delivered to the executor, together with a certificate of its having been proved, and such copy and certificate are usually styled the probate (z).

When scurrilous matter may be excluded from probate.

The Court cannot expunge any part of the original Will of an offensive or scurrilous character (a), and although the Court may have power to omit such matter from the engrossment of the Will for probate, and from the copy kept in the registry, it is a power to be exercised with great moderation and the Court will not interfere on light grounds (b).

Lost probate.

Where the probate is lost, the Spiritual Court never granted a second, but merely an exemplification of the probate from their own records, and such exemplification was evidence of the Will having been proved (c).

Rules of evidence.

SECT. 5.—Of evidence in testamentary matters.

By s. 33 of the Probate Act, 1857, "The rules of evidence observed in the Superior Courts of Common Law

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| (u) Williams (10th ed.) 246. | (a) Curtis v. Curtis, (1825) 3 Add. |
| (x) Neagle v. Cantillon, (1755) 2 Lee, 246; Williams (10th ed.) 297. | 33. |
| (y) Fowles v. Davidson, (1845) 4 N. C. 149. | (b) In the Goods of Honeywood, (1871) L. R. 2 P. & D. 251. |
| (z) Williams (10th ed.) 299. | (c) Williams (10th ed.) 299. |

at Westminster shall be applicable to, and observed in, the trial of all questions of fact in the Court of Probate."

By the common law the evidence of all persons having an interest, and the husbands or wives of such persons, was inadmissible (*d*).

Sect. 14 of the Wills Act, 1837, provides that a Will shall not be invalidated on account of the person attesting the execution being at the time or becoming incompetent to be admitted a witness to prove the execution thereof. Sect. 15 invalidates any devise, legacy, estate, interest, gift or appointment (other than and except charges and directions for the payment of any just debt or debts) so far as concerns any person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, but the person so attesting is admitted as a witness to prove the execution or the validity of the Will.

Sect. 16 enabled a creditor attesting to be admitted a witness.

Sect. 17 exempted a person appointed executor from being incompetent to prove the execution or validity of the Will.

Now by several statutes subsequently passed, the common law rule above referred to is entirely abrogated (*e*).

In determining what documents constitute the Will of a testator it is the duty of the Court to ascertain from the contents of the documents themselves, or, if need be, by recourse to external evidence, what was the intention of the testator (*f*). In the Court of Probate the whole question is one of intention—the *animus testandi* and the *animus revocandi* are completely open to investigation (*g*). Accordingly, in cases of doubt upon the face of the documents, touching the *factum* of the whole or any part of any testamentary instrument, external evidence is admissible to explain the intention of the testator, as, for instance, where the question is whether or not the testator intended the last instrument to constitute his sole Will, and so

Evidence in determining what constitutes the Will.

(*d*) Williams (10th ed.) 251.

(*e*) 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, s. 2; and 16 & 17 Vict. c. 83, s. 1.

(*f*) Chichester v. Quatrefages,

[1895] P. 186.

(*g*) Methuen v. Methuen, (1817) 2 Phillim. 416, 426; and see *ante*, p. 36.

by implication to revoke the first (h). But in such cases it would seem the Court will not look at anything more than is needed to put it in possession of the facts known to the testator at the time the Will in question was executed (i).

In *In the Goods of Thompson* (k) the question was whether the confirmation of the Will and the four codicils contained in the fifth codicil was a mistake, the intention of the testator being to confirm the Will and the fourth codicil, and there being no evidence as to how certain alterations in the fifth codicil, which gave rise to the question, had been made, the Court admitted evidence of the testator's verbal instructions to his solicitor for the preparation of the fifth codicil.

Parol evidence of surrounding circumstances is admissible, where there is an ambiguity on the face of the Will, as to the person intended by the testator as executor, but declarations by the testator himself as to his intentions are, it would seem, inadmissible (l).

Parol evidence is admissible to prove that a Will was executed on a date other than that which appears upon the face of it, although the effect of such evidence is to revoke an earlier Will bearing a later date (m).

In the absence of fraud, although the testator may be innocently misinformed as to the effect of the instrument, yet if it has been read over to him on the occasion of its execution, or its contents brought to his notice in any other way, it is to be assumed that he approved of as well as knew the contents (n). And if a testator employs another to convey his meaning in technical language, and that person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language himself (o). There is,

Error in date of a Will may be proved although effect is to revoke Will of later date.

When knowledge of contents of Will is assumed.

(h) *Jenner v. Finch*, (1879) 5 P. D. 106; *In the Estate of Bryan*, [1907] P. 125.

(i) *In the estate of Bryan*, *ubi sup.*

(k) (1865) L. R. 1 P. & D. 8.

(l) *In the Goods of Brake*, (1881) 6 P. D. 217; *In the Goods of Chappell*, [1894] P. 98.

(m) *Reffell v. Reffell*, (1866) L. R. 1

P. & D. 139.

(n) *Guardhouse v. Blackburn*, (1866) L. R. 1 P. & D. 109; *Collins v. Elstone*, [1893] P. 1; *Beamish v. Beamish*, [1894] 1 Ir. 7, where the law as to when knowledge and approval of the Will is to be presumed is considered.

(o) *Morrell v. Morrell*, (1882) 7 P. D. 68, 70.

however, no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a Will read over to him, and has thereupon executed it, all further inquiry is shut out (*p*).

Since by the Wills Act the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the Act, it follows that the Court has no power to correct omissions in a Will made after the Act; but the Court has power, if words have been inserted in a Will by fraud or by mistake, to correct the error by the omission of words so inserted (*q*).

Court has no power to correct omissions.

Where a word inserted by mistake is struck out, leaving a blank in its place, another word cannot be substituted, and it is for the Court of Construction to determine the meaning and effect of the Will having regard to the blank (*r*).

Words cannot be substituted:

Although where a portion of a Will introduced through fraud or inadvertence may be rejected and probate granted of the remainder if the two are severable, yet where the rejection of part alters the sense of the remainder, it may be a question whether there is a valid Will at all within the meaning of s. 9 of the Wills Act, 1837 (*s*).

although rejection of part may destroy validity of remainder.

When a question arises whether alterations on the face of a Will were made before or after execution, the statements of a testator made before the execution of the Will may be given in evidence showing an intention to benefit an individual which will not be carried out unless the alterations are admitted (*t*); but a declaration by the testator after the Will was executed that the alteration had been made previously would be inadmissible (*u*).

Declarations of testator: When admissible to rebut presumption that unattested alterations were made after execution.

In questions, however, of fraud and testamentary capacity,

To prove testamentary capacity or fraud.

(*p*) *Fulton v. Andrew*, (1875) L. R. 7 H. L. 448.

(1902) 87 L. T. 144.

(*q*) See *Williams* (10th ed.) 258; and see *Morrell v. Morrell*, *ubi sup.*; *In the Goods of Schott*, [1901] P. 190.

(*s*) *Rhodes v. Rhodes*, (1882) 7 App. Cas. 192, 198.

(*t*) *Doe v. Palmer*, (1851) 16 Q. B. 747; *Dench v. Dench*, (1877) 2 P. D. 60.

(*r*) *In the Goods of Walkeley*, (1893) 69 L. T. 419; *Vaughan v. Clerk*,

(*u*) *Doe v. Palmer*, *ubi sup.*

declarations of a testator, whether made before or after a Will has been executed, are admissible (x).

Not to prove execution.

Statements made by a testator are not admissible to prove the execution by him of a Will, and they are equally inadmissible to prove that the Will was executed in duplicate (y).

To rebut presumption of revocation.

In order to rebut the presumption of revocation arising from a Will which was in a testator's possession not being found after his death, and to establish what is called adherence to the Will, evidence of statements made by the testator subsequently to the execution of the Will that he intends to act in conformity with the dispositions contained in the Will is admissible, and it follows that statements made by a testator to a contrary effect must also be admissible (z).

To prove contents of Will.

The contents of a lost Will, like those of any other lost instrument, may be proved by secondary evidence (a), and declarations, written or oral, made by a testator before the execution of his Will, are, in the event of its loss, admissible as secondary evidence of its contents. Such declarations, however, are not strictly evidence of the contents of the instrument, but simply evidence of the intention of the person who afterwards executes the instrument, and its cogency depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the instrument, and it must satisfy the Court beyond all reasonable doubt that it has really before it the testamentary intentions of the testator (b).

Whether declarations made after the execution of the Will are admissible as evidence of its contents is not free from doubt. In *Sugden v. Lord St. Leonards* (c) the Court of Appeal (Mellish, L.J., dissenting) overruled *Quick v. Quick* (d), and decided that such declarations were admissible as secondary

(x) *Doe v. Hardy*, (1836) 1 Moo. & Rob. 525; *Sutton v. Sadler*, (1857) 3 C. B. N. S. 99; *Doe v. Palmer*, *ubi sup.*, at p. 579.

(y) *Atkinson v. Morris*, [1897] P. 40.

(z) *Keen v. Keen*, (1873) L. R. 3 P. & D. 105; and see *Sugden v. Lord St.*

Leonards, (1876) 1 P. D. 154, at p. 228.

(a) *Sugden v. Lord St. Leonards*, *ubi sup.*

(b) *Sugden v. Lord St. Leonards*, *ubi sup.*, at p. 242.

(c) *Ubi sup.*

(d) (1864) 3 Sw. & Tr. 442.

evidence of the contents. But in *Woodward v. Gouldstone* (e) the House of Lords considered that the point so decided in *Sugden v. Lord St. Leonards* would be open to review, and their lordships expressly guarded themselves against its being supposed that they held that such post testamentary declarations are admissible.

The contents of a lost Will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached (f).

Contents proved by evidence of single witness.

When the contents of a lost Will are not completely proved probate will be granted to the extent to which they are proved (g).

Contents proved in part.

There are no degrees of secondary evidence, and where a Will has been lost, and evidence of its contents is supplied by the production of a draft, and of the parol testimony of persons who had read the Will, the parol testimony must be placed side by side with the draft, and out of them the Court will extract the contents of the Will to be proved (h).

No degrees of secondary evidence.

A person who propounds for probate an alleged Will, and who is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on those points (i).

The maxim "*Omnia præsumuntur rite esse acta*" expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; and when the actual observance of all due formalities can only be inferred as a matter of probability (k). Consequently where the contents of the Will and signature of the testator were proved, but there was no attestation clause, and the attesting witnesses were both dead, and

When maxim "*Omnia præsumuntur rite esse acta*" may be applied.

(e) (1886) 11 App. Cas. 469.

(f) *Sugden v. Lord St. Leonards*,
ubi sup.

(g) *Ibid.*

(h) *Burl v. Burl*, (1868) L. R. 1

P. & D. 472.

(i) *Harris v. Knight*, (1890) 15
P. D. 170, 179, per Lindley, L.J.

(k) *Ibid.*

the handwriting of only one of them was proved, the Court presumed that the lost Will was duly executed, and granted probate accordingly (l).

SECT. 6.—Of what instruments Probate is necessary.

Paper neither disposing of property nor appointing executor not admitted to probate,

A paper which neither disposes of property nor appoints an executor generally speaking has no testamentary character so as to enable the Court to grant probate of it (m). For instance, a Will simply appointing testamentary guardians and not disposing of property nor appointing an executor is not entitled to probate, since the jurisdiction of the Court to grant probate of an instrument is founded on the fact that it affects property (n).

unless a codicil revoking Will.

But a codicil, not containing any disposition of property, but simply revoking all former Wills, is of a testamentary nature, and ought to be admitted to probate. So if the executor after probate discovers any testamentary paper, he ought to bring it into the registry though it be a mere confirmation of the Will already proved (o).

Will relating to real estate only and not appointing executor must now be proved,

Prior to the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (8), there was no jurisdiction in the Probate Division to grant probate of a Will limited to the disposition of real property only, although it contained the appointment of an executor and the real estate was given to such executor with directions to convert the same into personal estate (p).

Now by that Act probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

unless relating only to foreign immovable property.

A Will dealing only with real and immovable property in a foreign country will not be admitted to probate in the Probate Division, and the Court will refuse to allow documents referring

(l) *Harris v. Knight*, *ubi sup.*

(m) Williams (10th ed.) 300.

(n) In the Goods of Morton, (1864) 3 Sw. & Tr. 422.

(o) Williams (10th ed.) 300; and see *Widdall v. Nixon*, (1853) 17 Beav. 160.

(p) In the Goods of Barden, (1867) L. R. 1 P. & D. 325; In the Goods of Bootle, (1874) L. R. 3 P. & D. 177; In the Goods of Tomlinson, (1881) 6 P. D. 209.

only to property in a foreign country to be included in the probate of the English Will (*q*).

A Will made in exercise of a power must be proved (*r*), even though made in exercise of a special power (*s*).

Will in exercise of a power.

A valid declaration of trust by a legatee may exist independently of the Will, and in that case it is not to be considered as a testamentary paper to be admitted to probate, although it may be received as evidence against the legatee of the nature of the trust on which the legacy is held by him (*t*).

Independent declaration of trust not admitted to probate.

Where on the face of a Will it appears that a legacy is given to a legatee to be applied for purposes previously agreed upon between the testator and the legatee evidence is admissible to show what those purposes were (*u*).

When binding on legatee.

Where the trust does not appear on the face of the Will, it can be enforced against the legatee if it relates to a definite object and the legatee has accepted the particular trust. It must of necessity be communicated to the legatee in the testator's lifetime, but it may be sufficiently communicated if put in writing and placed in his hands in a sealed envelope and he engages to hold the property given to him by the Will upon the trusts so declared, although he did not know the actual terms of the trust; but an engagement to hold the property upon the terms of any paper that might be found after the testator's death would not be effectual (*x*).

A trust will be imposed on the legatee by expressly promising or tacitly consenting to carry out the testator's wishes, and whether the testator is thereby induced to make or to abstain from revoking a Will leaving him property. If, however, the legacy is given to two persons as tenants in common, the express promise or tacit consent of one of them that both will carry out the testator's wishes will not bind the

What amounts to a trust.

(*q*) In the Goods of Tamplin, [1894] P. 39.

(*r*) Sugden on Powers (8th ed.) 466; Farwell on Powers (2nd ed.) 134.

(*s*) *Re Vallance*, (1883) 24 C. D. 177. In the case of a colonial Will the colonial probate must be sealed under 55 Vict. c. 6.

(*t*) *Smith v. Attersoll*, (1826) 1 Russ. 266. With regard to secret trusts, see *post*, p. 190.

(*u*) *Re Fleetwood*, (1880) 15 C. D. 594; *Re Huxtable*, [1902] 1 Ch. 214, 2 Ch. 793.

(*x*) *Re Boyes*, (1884) 26 C. D. 520.

other if he knows nothing of the matter until after the testator's death, since to hold otherwise would enable one beneficiary to deprive the other of his benefit by setting up a secret trust. But if the legacy is given to the two as joint tenants, there is a distinction between those cases in which the Will is made on the faith of the antecedent promise or tacit consent of one of the legatees and those in which the Will is left unrevoked on the faith of the subsequent promise or tacit consent; in the former the trust binds both legatees, since no person can claim an interest under a fraud committed by another; in the latter case the one and not the other is bound, since the gift is not tainted with any fraud in procuring the execution of the Will (y).

Where a gift is absolute, the intention of the testator, whether appearing on the face of the Will or communicated independently, that the property should reach another destination through the voluntary exercise by the legatee of his own right of ownership, and not through any contract, arrangement, or understanding, binding the conscience of the legatee, will not make the legatee a trustee (z).

Where the trust does not appear on the face of the Will, what a person takes under the trust is something not under the Will, but solely by virtue of the secret trust not disclosed on the Will (a). Consequently a person will not lose a benefit to which he is entitled under the trust by reason of his being a witness to the Will (b).

A letter written by a testator subsequently to making his Will declaring the trusts on which he has bequeathed property to his trustees cannot be admitted to probate, as the effect would be to receive as part of the Will, or as codicils to the Will, papers unattested (c). So also parol evidence is

(y) *Re Stead*, [1900] 1 Ch. 237, 240, per Farwell, J.

(z) See per FitzGibbon, L.J., in *Geddis v. Semple*, [1903] 1 Ir. R. 73.

(a) *Cullen v. Att.-Gen.*, (1866) L. R. 1 H. L. 190; *O'Brien v. Condor*, [1905] 1 Ir. R. 51.

(b) *O'Brien v. Condor*, *ubi sup.*: not

following in this respect *Re Fleetwood*, *ubi sup.*

(c) *Johnson v. Ball*, (1851) 5 De G. & Sm. 85; and see *ante*, pp. 9, 40, as to the circumstances under which papers referred to in a Will may be incorporated in the probate.

inadmissible to define or supplement that which on the face of the Will is left undefined or unexpressed (*d*).

No probate can be granted of the Will of a deceased Sovereign, and in the case of a claim under such a Will the proper course is for the claimant to proceed by petition of right (*e*).

Will of a deceased Sovereign.

An executor cannot safely deliver over sealed packets in pursuance of a direction in the Will, as they may contain securities for money or papers of a testamentary character which should be admitted to probate (*f*).

Sealed packets.

SECT. 7.—Of Probate where there are several executors.

Probate to one of several executors, the right of the other being reserved, enures to the benefit of all; and upon the death of the executor to whom probate has been granted the other executor may accept the office; and upon doing so fully represents his testator without further probate. For although a surviving executor on being cited may prove the Will a second time, yet in point of law the probate to the one executor enures to every purpose for which probate is necessary (*g*).

Probate to one of several executors enures for the benefit of all.

So also where several executors are appointed with distinct powers, as for separate parts of the estate, or where an executor is appointed for a period and afterwards another person is appointed executor, probate of the Will by one executor is sufficient (*h*).

So also limited probate.

It is, however, usual and proper to take out what is called a double probate; or, where the first executorship has ceased, a cessate probate. In such cases the executor makes an oath as in other cases of probate, and he may be either sworn to and mark the original Will, or (if all the proving executors are dead) the probate which was granted of it; or he may be sworn to a certified office copy under seal of the Will. He will swear to administer generally the estate, and not merely

Practice to take out a double or cessate probate.

(*d*) *Re Hetley*, [1902] 2 Ch. 866.

Lee, 46.

(*e*) *Ryves v. Duke of Wellington*, (1846) 9 Beav. 579.

(*g*) *Cummins v. Cummins*, (1845) 3 J. & Lat. 64.

(*f*) *Pelham v. Newton*, (1754) 2

(*h*) See *Williams* (10th ed.) 295, 296.

to what remains unadministered, but the amount of the estate as sworn in the oath will be the value of what remains unadministered at the time (i).

SECT. 8.—*Of costs of proceedings in the Probate Division.*

Under the practice of the Prerogative Court and afterwards of the Court of Probate the question of costs was in the discretion of the judge.

Costs : Rule
of Preroga-
tive Court.

Judicature
Act, 1890,
s. 5.

The Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5, provides that "Subject to the Supreme Court of Judicature Acts and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

On trial by
jury.

Ord. LXV., r. 1, R. S. C., 1888, provides that where any action or issue is tried by a jury, the costs shall follow the event unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order.

Party insist-
ing on proof
in solemn
form cross-
examining
witnesses
only.

But Ord. XXI., r. 18 (as amended), provides that "the party opposing a Will may with his defence give notice to the party setting up the Will, that he merely insists upon the Will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the Will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the Will" (k).

Proceedings
for revocation
of probate.

A notice given under Ord. XXI., r. 18, does not apply to the case of a party who claims revocation of probate (l).

(i) See Tr. & Co. P. P. (14th ed.) p. 154.

(k) See *Spicer v. Spicer*, [1899] P. 38, for an instance where it was held

the opposition was without reasonable ground.

(l) *Tomalin v. Smart*, [1904] P. 141.

Two rules were laid down by Sir J. P. Wilde in *Mitchell v. Gard* (m) for the future guidance of the Court in probate causes, and have since been followed (n). Rules for guidance of Court.

First, if the cause of litigation takes its origin in the fault of the testator, or those interested in the residue, the costs may be properly paid out of the estate.

Secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the Will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

But neither of those principles, which, however, are not exhaustive, justifies a plea of undue influence unless there are reasonable grounds for putting it forward (o).

Prima facie, an executor is justified in propounding his testator's Will, yet if it is made to appear that, when propounding it, he must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported, he ought to be condemned in the costs. But if the facts within his knowledge at the time he propounds the Will tend to show eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induced a jury to find that the testator was insane at the date of the Will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the Will is pronounced against (p). Executor *prima facie* justified in propounding Will.

Where an executrix through her negligence lost a Will, and propounded, and in most particulars established, the substance of it, she was ordered to pay the costs of the defendants, and was allowed out of the estate only such costs as she would have incurred in proving the original Will in solemn form (q). Where Will lost through negligence of executor.

A legatee who has propounded a codicil and succeeded is Successful legatee propounding codicil.

(m) (1861) 3 Sw. & Tr. 275.

(p) Boughton v. Knight (1873)

(n) See Williams (10th ed.) 287, and cases cited.

L. R. 3 P. & D. 64.

(q) Burls v. Burls, (1868) L. R. 1

(o) Spiers v. English, [1907] P. 122.

P. & D. 472.

entitled to the same costs as an executor under similar circumstances (*r*).

Costs of
interveners.

There is no definite rule as to the payment of the costs by or to interveners. Each particular case depends on its own circumstances (*s*).

Defendant
cited but not
appearing.

Where a defendant, who had been cited but had not entered an appearance, had destroyed the Will, the subject of proof, the Court condemned her to pay the costs of the suit for propounding the contents of the Will, although she had not appeared (*t*); and a person who had improperly entered a caveat against probate of a Will the validity of which had been previously established was condemned in the costs thereby occasioned (*u*).

Person enter-
ing caveat.

Costs ordered
out of parti-
cular portion
of the estate.

By Ord. LXV., r. 14, R. S. C., 1904, in any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly. Under this rule, in *Harrington v. Butt* (*x*), in pronouncing for the Will, the Court ordered the costs of all parties to be paid out of that portion of the residuary estate passing under the Will to four out of six defendants; and in *Dean v. Bulmer* (*y*) the Court ordered the costs of both plaintiff and defendant to be charged on and paid out of the corpus of certain real estate devised by the Will to successive life tenants. In the absence of any direction the costs are payable out of the entirety of the estate in due course of administration, and should the personal estate be insufficient the costs of the plaintiffs propounding the Will ordered to be paid "out of the estate" must be borne by the real estate (*z*).

Where no
particular
direction,
costs out of
the estate
payable in
due course of
administra-
tion.

SECT. 9.—Of what the Probate is evidence.

Conclusive
upon the
factum and
validity of
Will.

A probate granted by the Probate Division is conclusive evidence that the instrument proved is testamentary

(*r*) *Wilkinson v. Corfield*, (1881) 6 P. D. 27.

(*s*) See *Williams* (10th ed.) 289, 290, and cases referred to.

(*t*) *King v. Gillard*, (1887) L. R. 1 P. & D. 539.

(*u*) *Ratcliffe v. Barnes*, (1862) 31 L. J. P. & M. 61.

(*w*) [1905] P. 3, note.

(*y*) [1905] P. 1.

(*z*) *Re Vickerstaff*, [1906] 1 Ch. 762.

according to the law of the country ; it is conclusive upon the factum and validity of the Will (a).

Without the constat of the Court of Probate no other Court can take notice of the rights of representation to personal estate : and when such Court has by the grant of probate or letters of administration established the right, no other Court can permit it to be gainsaid (b).

Only evidence of executor's title.

The sentence of the Court of Probate, however, is conclusive only of the right directly determined, and not of any collateral matter which may possibly be collected or inferred from the sentence(c) ; therefore the probate or grant of administration is not conclusive as to the domicile of the testator or intestate (d), or of the death of the testator or intestate (e), although in the absence of evidence to the contrary it may possibly be admissible as *prima facie* evidence (f).

Not conclusive of collateral matter.

Moreover, since a judgment is rendered inadmissible in evidence on proof that the Court which pronounced it had no jurisdiction (g), the probate or grant of administration may be defeated by showing that the testator or intestate is alive (h).

So also it may be shown that the seal of the Court has been forged, or that the probate has been revoked (i).

Where probate has been obtained of a forged Will, or by fraud on the next-of-kin, equity may interfere by decreeing the wrong-doer to be a trustee in respect of such probate, and to consent to a revocation of it in the Court in which it was granted, without interfering with any jurisdiction (k).

Equity jurisdiction in case of fraud.

(a) Whicker v. Hume, (1858) 7 H. L. C. 124. The Act-book, containing the entry of the Will and probate, is the primary evidence and is admissible without accounting for the non-production of the probate : Cox v. Allingham, (1822) Jac. 514.

(b) Att.-Gen. v. Partington, (1864) 3 H. & C. 193, 204 ; and see Williams (10th ed.) 431 *et seq.* Though the Chancery Division may have jurisdiction to recall probate, it is not a jurisdiction which should be exercised ; see Pinney v. Hunt, (1877) 6 C. D. 98 ; Bradford v. Young, (1884) 26 C. D. 656, 667.

(c) Williams (10th ed.) 440.

(d) Whicker v. Hume, *ubi sup.* ; Concha v. Concha, (1886) 11 App. Cas. 541.

(e) Moons v. De Bernales, (1826) 1 Russ. 301, 307.

(f) See Williams (10th ed.) 440, and Taylor on Evidence (9th ed.) s. 167.

(g) Taylor on Evidence (9th ed.) s. 1714.

(h) Allen v. Dundas, (1789) 3 T. R. 125, 130.

(i) Williams (10th ed.) 441.

(k) Barnesly v. Powell, (1748) 1 Ves. Sen. 119, 289 ; Williams (10th ed.) 435.

So also where a probate action was compromised and a consent judgment taken establishing the earlier of two Wills, and it was afterwards discovered that the earlier Will was a forgery, in an action in the Chancery Division the forgery was established and the compromise was set aside; and it was held by the Court of Appeal that although the Chancery Division has no jurisdiction to revoke the probate of the Will it had full jurisdiction to decide that it was a forgery; and having so decided, in another action in the Probate Division, for revocation of the probate of the earlier Will, the defendants in the probate action, who were parties to the Chancery action, were estopped from denying the forgery (*l*).

Probate is conclusive as to every part of the Will; therefore no question as to the validity of an interlineation can be entertained by a Court of Equity (*m*).

So where probate is granted as of a Will and codicil it is conclusive of the fact of distinct instruments, though written on the same paper; as for instance on a question arising whether legacies were intended to be cumulative or substituted (*n*).

The original Will may be looked at to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate (*o*).

For instance the Court may look at the Will itself in order to derive aid in its construction from the punctuation, or manner of writing (*p*), or from other appearances on the face of it, such as blanks appearing in the probate copy (*q*), and where the question is whether they arose from an accidental omission to fill up a printed form or from an intention not to fill them up (*r*). The practice in this respect is not different by reason of the probate having been granted in *fac simile* (*s*).

In the case of a foreign Will, where an English translation

Probate of Will and codicil conclusive of distinct instruments.

When original Will may be looked at.

Court of Construction not

- | | |
|---|---|
| (<i>l</i>) Priestman v. Thomas, (1884) 9 C. D. 70, 210. | 9 Hare, 802, n. |
| (<i>m</i>) Plume v. Beale, (1717) 1 P. Wms. 388. | (<i>q</i>) Taylor v. Richardson, (1854) Drewry 16. |
| (<i>n</i>) Baillie v. Butterfield, (1787) 1 Cox, 392. | (<i>r</i>) Re Harrison, (1885) 30 C. D. 390. |
| (<i>o</i>) Williams (10th ed.) 448. | (<i>s</i>) Gann v. Gregory, (1854) 3 De G. M. & G. 777; Shea v. Boschetti, (1854) 18 Beav. 321. |
| (<i>p</i>) Oppenheimer v. Henry, (1853) | |

has been proved, and a copy of the Will in the foreign language deposited, as nothing but the original is part of the probate, and the Court of Probate has no power to make a translation, the Court of Construction is not bound by the translation in case of mistake (*t*): although it may be the Court is not entitled to look at the original, if any of the parties object, until the English translation is brought before the Probate Division for the purpose of being corrected (*u*).

bound by a mistake in translation of foreign Will.

The Ecclesiastical Court and, except as provided by the Court of Probate Act, 1857, the Court of Probate had no jurisdiction to authenticate a Will as far as it related to real estate, consequently the probate was no evidence of the validity or contents of a Will to such property, and not even when the original Will was lost, except as a mere copy (*x*).

As to real estate.

By the Court of Probate Act, 1857 (s. 61), where proceedings are taken under the Act for proving a Will in solemn form, or for revoking probate of a Will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under the Act the validity of a Will is disputed, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the Will shall be cited, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to the rules and orders and the discretion of the Court. And (s. 62) where probate is granted after such proof in solemn form, or where the validity of the Will is otherwise declared by decree or order in such contentious cause or matter, the probate, decree, or order shall enure for the benefit of all persons interested in the real estate affected by the Will, and shall be received as conclusive evidence of the validity and contents of such Will; and where probate is refused or revoked, on the ground of the invalidity of the Will, or the invalidity of the Will is otherwise declared by decree or order under the Act, such decree or order shall enure for the benefit of the heir-at-law

Effect of 20 & 21 Vict. c. 77, where heir-at-law, devisee, or other person having or pretending interest is cited.

(*t*) *L'Fit v. L'Batt*, (1718) 1 P. Wms. 229.
526.

(*u*) *Re Cliffe's Trusts*, [1892] 2 Ch.

(*x*) Williams (10th ed.) 440.

or other persons against whose interest in real estate such Will might operate. Should the Court think fit it may (s. 68) proceed without citing the heir, or other persons interested in the real estate, but the probate, decree, or order of the Court shall not in any case affect the heir, or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

In an action as to the validity of a Will, the Court will not order the assignee of the heir-at-law of the testator to be cited as a person having or pretending interest in the real estate affected by the Will (y).

Act only applies to Will executed after and in accordance with Wills Act, 1837.

The above sections are only applicable to Wills which require for their validity the same formularies in respect both of real and personal estate, so that one inquiry upon the validity of the Will shall suffice for both, and therefore they do not apply to a Will made before the Wills Act, 1837 (z). The practice as to citations has not been altered by the Judicature Acts (a).

Effect of 20 & 21 Vict. c. 77 as to notice of intention to give in evidence probate or letters of administration with the Will annexed.

Under s. 64, in any action where it is necessary for a party to establish a devise or other testamentary disposition of real estate, he may give to the opposite party ten days at least before the trial, or other proceeding, notice of intention to give in evidence the probate of the Will, or the letters of administration with the Will annexed, or a stamped copy thereof, and in such case, if the opposite party do not give a counter-notice within four days that he disputes the validity of such devise or other testamentary disposition, such probate, or letters of administration, or stamped copy thereof, shall be sufficient evidence of the Will and of its validity and contents.

The meaning of this section is that when a notice has been given and no counter-notice is given, the probate, without more, will be admissible evidence of the Will and its contents as to realty, and will be *primâ facie* evidence of the validity of

(y) *Jones v. Jones*, (1882) 7 P. D. 66.

(a) *Kennaway v. Kennaway*, (1876)

(z) *Campbell v. Lucy*, (1871) L. R. 1 P. D. 148.

2 P. & D. 209.

the Will and the competence of the testator; but there is nothing to prevent the opposite party from showing by evidence that the Will is not valid, or that the testator was not competent (b).

Sect. 65 provides that "In every case in which, in any such action or suit, the original Will shall be produced and proved, it shall be lawful for the Court or Judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid."

In the case of death after December 31, 1897, under s. 1 of the Land Transfer Act, 1897, real estate of the deceased vests in his personal representative, and probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. But real estate under this Act does not include land of copyhold tenure or customary freehold in any case in which an administration or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant. In cases not coming within the operation of this Act it will still be necessary in order to establish a devise of real estate, if the Will has not been proved in solemn form and its validity declared by decree or order so as to fall within s. 62 of the Court of Probate Act, 1857, to produce the original Will and prove its due execution, unless notice has been given and no counter-notice has been received under s. 64 of the same Act, and the validity of the Will is not contested.

Effect of the
Land Trans-
fer Act, 1897.

The probate is merely operative as authenticated evidence, and not as the foundation, of the executor's title; for he derives all his interest from the Will itself, and the property of the deceased vests in him from the moment of the testator's death. Consequently the probate is said to have relation to the time of the testator's death(c).

Probate
merely
authenti-
cated evi-
dence, not the
foundation, of
the executor's
title.

(b) *Barraclough v. Greenhough*,
(1867) L. R. 2 Q. B. 612.

(c) *Williams* (10th ed.) 214;
ante, pp. 1, 63.

CANADIAN NOTES.

Jurisdiction.

The Surrogate Courts of Ontario are invested with the authority and jurisdiction over executors and administrators, and the rendering by them of inventories and accounts, conferred in England on the Ordinary under 21 Henry VIII. c. 5, the effect of Rule 19 of the Surrogate Courts Rules of 1892, as limited by section 73 of the Surrogate Courts Act, R.S.O., c. 59, being to bring the practice back to that in force under the ancient statute. *Cunnington v. Cunningham* (1901), 2 O.L.R. 511.

The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of Ontario. Resort must be had to the administrative powers of the High Court for full inquiry and accounting. *Re Russell* (1904), 8 O.L.R. 481. (The English authorities as to jurisdiction are reviewed in this case.) The Ontario Statute, 5 Edw. VII. c. 14, which was passed, no doubt, in view of such cases as *Re Russell* has much enlarged the powers of the Surrogate Court. See *Union Trust Co. v. Beasley* (1908), 12 O.W.R. 336.

The acts of the Surrogate Judge in passing accounts of executors are those of the Court and not of a Judge as *persona designata*. *In re Wilson and Toronto General Trusts Corporation* (1906), 13 O.L.R. 82.

A Surrogate Court Judge on passing the accounts of an executor or administrator under the provisions of s. 72 of the Surrogate Courts Act, (O.) as amended by 5 Edw. VII., c.

14 (O.) has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If, however, the executor, administrator, or trustee has in good faith paid the claim of a creditor before bringing in his accounts the Surrogate Court has jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts. *In re McIntyre* (1906), 11 O.L.R. 136.

A Surrogate Judge, acting as the Surrogate Court, who has been induced by fraud of the applicant to grant an order, has inherent jurisdiction to set it aside, and also to set aside or vary an order which he has made by mistake. He, therefore, has jurisdiction to vacate an order made by himself upon the taking of executors' accounts and to reopen the accounts and further investigate them without reference to the order made. But he has no jurisdiction to correct errors made in the judicial determination by him of any question. *In re Wilson and Toronto General Trusts Corporation* (1906), 13 O.L.R. 82.

Order
obtained
by fraud.

A Court of Probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other Court, and a Court of Equity in a suit to remove the executors and trustees may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court. *Grant v. Maclaren* (1894), 23 S.C.R. 310.

Accounts of
trustees.

Under the Probate Court Act, R.S.N.S., c. 158, a Judge of Probate in settling an estate has no jurisdiction to determine a question in controversy respecting the ownership of certain money, where necessary parties were not before him. *Re Estate of Maria Wheelock* (1900), 33 N.S.R. 357.

EXECUTORS.

Apart from any rule the Court of its own motion having jurisdiction in the matter might call upon executors to produce their accounts either by citation or summons. *Re Phislator* (1908), 8 W.L.R. 716.

Where a Surrogate Court has jurisdiction to grant administration, though the grant may have been irregularly obtained and improvidently issued, the validity of the grant cannot be questioned. *London and Western Trusts Co. v. Traders Bank of Canada* (1908), 11 O.W.R. 977.

In Nova Scotia the Probate Act provided that the Judge of Probate for the county or district where the deceased last dwelt shall have power to grant letters of administration, etc. Where a Judge in one county revoked letters of administration granted by him on the ground that it had been made to appear that the deceased last dwelt in another county, it was held, on appeal, that he has power to do so. *Re Estate of Caroline Fraser* (1897), 30 N.S.R. 272.

Where upon an accounting by executors before a Surrogate Court Judge, it was objected by the residuary legatees that a certain sum of money, not included in the executor's inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed the sum as a gift from the testator in his lifetime, it was held that the Judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was, which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him. *Re Russell* (1904), 8 O.L.R. 481. See *Union Trust Co. v. Beasley* (1908), 12 O.W.R. 336.

In settling an estate in the Probate Court, the Judge, at the instance of the next of kin of deceased, undertook to dispose of the sum of \$1,000 which the administrator, a brother of deceased, contended had been given to him by deceased, two years before her death, as a gift for his two sons. In thus dealing with and deciding the question of gift or no gift, where the rights of third parties had intervened who were not before him, and to compel the appearance of whom he had no process, he went beyond his jurisdiction. *In re Estate Maria Wheelock* (1900), 33 N.S.R. 357.

Rights of
third
parties.

Much is left to the discretion of the High Court Judge in applications under s. 34 of the Surrogate Courts Act, (O.) to remove a cause from a Surrogate Court into the High Court, the points for consideration in determining the forum of trial being the nature of the contest and the magnitude of the estate. Where the contest was over the will of a widow, whose husband died in 1905, leaving to her an estate valued at over \$27,000 which had shrunk at her death in 1907 to \$5,850 and the allegation was that she had not been able to protect herself against undue influence of the chief beneficiaries, her two sons, to whom it was said a large part of her husband's estate had been transferred in her lifetime, the application to remove the cause into the High Court was granted. *Re Reith et al. v. Reith et al.* (1908), 16 O.L.R. 168.

The Nova Scotia Probate Act provided that the Judge of Probate for the county or district where the deceased "last dwelt" shall have power to grant letters of administration. In this provision the words "last dwelt" are equivalent to last resided, and mean the fixed abode of the testator in contradistinction to a mere temporary locality of existence. *Re Estate Caroline Fraser* (1897), 30 N.S.R. 272.

Words "last
dwelt" mean
fixed abode.

EXECUTORS.

A Judge of Probate is not warranted in granting a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personality and the amount of the debts, and thus ascertains the deficiency. A bald adjudication that there is a deficiency, based on a list of attested accounts, and the evidence of the petitioner, that they were filed against the estate is not sufficient. *Re Welch* (1899), 36 N.B.R. 628.

Removal
of executor.

In proceedings, in Nova Scotia, to remove an executor from office, where the whole estate is before the Probate Court, the proper course is to apply there, the Judge of that Court having power by a summary application, if he should think it for the interest of the estate, to order the executor to pay the money of the estate coming into his hands into a chartered bank to the credit of the estate, and upon due proof that he is wasting the estate to require him to give security for the due performance of his duty; and if such order be not obeyed he may cancel the authority and appoint another in his place. *Smithers v. Smithers* (1889), R.E.D. 483. See *Ross v. Ross*, Coutlee's Digest, p. 596, where an executrix, on the application of the remaining legatees was removed for having made a fraudulent lease to a tenant, to the injury of the estate.

A Judge of Probate has power to hear and consider evidence at any time before making his final decree. *Re Estate of Maria Wheelock* (1900), 33 N.S.R. 357.

In the Yukon Territory there is no Court of Probate or Surrogate, apart from the Territorial Court, which exercises all the functions which would be exercised by a separate Court of Probate, and the proof of wills and the issuing of letters of administration are dealt with in the Territorial Court, where all proceedings in regard to estates

of deceased persons are carried on. *Re Phiscator* (1908), 8 W.L.R. 716.

In Manitoba a Judge of the Court of King's Bench has no jurisdiction to order the removal, under section 63 of the Surrogate Courts Act, R.S.M., c. 41, of a contested petition from the Surrogate Court to the Court of King's Bench, unless reasonable notice of the application for removal has been given to the other parties concerned. *In re Estate of B.*, deceased (1906), 16 Man. R. 269.

Consolidated Rule 642, which substitutes a proceeding by petition for the practice of filing certain kinds of bills abolished by the General Order of 1853, does not apply to a petition to a Surrogate Judge to vacate an order made by him on the passing of executor's accounts, but must be confined to cases in which under the former practice such relief as is mentioned in it could be obtained by one or other of such bills. *In re Wilson and Toronto General Trusts Corporation* (1907), 13 O.L.R. 82.

In a suit brought to remove an executor from office, an interlocutory order to compel the executor to pay into Court the proceeds of sales was refused, the affidavits on which it was brought being answered in every particular. Ritchie, J., without deciding that the Equity Court had no jurisdiction in a case of this kind, said: "In order to sustain an application for such an interlocutory order in such a suit as this, it is incumbent on the parties applying to make it appear that there has been misconduct on the part of the executor, or that the assets of the estate are being wasted." *Smithers v. Smithers* (1880), R.E.D. 483.

In an application for removal of a contested petition from the Surrogate Court to the Court of King's Bench, under Parties
concerned
in petition

to revoke
letters.

section 63 of the Surrogate Courts Act, R.S.M., c. 41, reasonable notice of the application must be given to the other parties concerned, and a son of the deceased and also of the administratrix of the estate of the deceased to whom letters had been granted as his widow, is a party concerned in a petition by the sister of the deceased to revoke the letters of administration on the alleged ground that the administratrix was not the lawful widow of the deceased. *In re Estate of B.*, deceased (1906), 16 Man. R. 269.

Appeal.

Under section 58 of the King's Bench Act (Man.), an appeal lies to the Court in *banc* from an order of a Judge of that Court for the removal of a contentious matter to said Court under the Surrogate Courts Acts. (*Doll v. Howard* (1896), 11 Man. R. 21, distinguished); *In re Estate of B.*, deceased (1906), 16 Man. R. 269.

Where an executor sold property of the estate to his wife for a sum much below its value as found by the Judge of Probate, the Judge ordered that the executor should account for the difference in value, and it was held on appeal, that though the Probate Court could not set aside the sale, it had jurisdiction to make the order in question. *Daly v. Brown*, 1 E.L.R. 487; 39 S.C.R. 122.

Where letters probate or of administration have issued out of a Court from which they could not properly issue under the Surrogate Courts Act, R.S.O. 1897, c. 59, s. 19, they are nevertheless valid unless and until revoked. *London and Western Trusts Co. v. Traders Bank of Canada* (1908), 16 O.L.R. 382.

Whatever executors named do, in relation to the effects of the testator, which shews an intention on their part to take upon them the executorship, will amount to an acceptance of

the office. As the assets of the testator vest in the executors without probate, any authority that they may exercise in relation to them will be an acceptance of the executorship. *Vannato v. Mitchell* (1867), 13 Gr. 665. Various acts which would make executors named in a will liable as having assumed the duty of executors, notwithstanding renunciation, are considered in *Vannato v. Mitchell*, *supra*.

Where land was sold under an execution against executors obtained on their confession, it was held that the sale was valid although the executors had not proved the will, as by confessing judgment they had accepted the office. *Mandeville v. Mitchell*, 16 U.C.Q.B. 609. And where executors defended an action before probate they were held to have thereby accepted office. *McDonald v. McDonald* (1890), 17 A.R. 192.

Acts of
executors
construed as
acceptance
of office.

CHAPTER VI.

OF INTESTACY AND GRANT OF LETTERS OF ADMINISTRATION.

SECT. 1.—*Origin of and jurisdiction to grant Letters of Administration.*

IN case a person makes no testamentary disposition of the whole part of his property he is said to be intestate(a).

Origin of administrators.

King's prerogative.

Jurisdiction of the Ordinary.

In ancient times the King, as *parens patriæ*, seized the goods of the intestate, to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. This prerogative the King continued to exercise for some time by his own ministers of justice, and probably in the County Court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who had, until the passing of the Court of Probate Act, 1857, a prescriptive right to grant administration to their intestate tenants and suitors, in their own Courts Baron and other Courts. Afterwards the Crown invested the Ordinary with this branch of the prerogative. Although the clergy had never by law any beneficial interest in the property of intestates, but merely the right or duty of administration, and the right of possession for the latter purpose, yet it was said they took to themselves the residue of the deceased's estate after the *partes rationabiles* of the wife and children had been deducted, and without even paying his lawful debts and charges thereon, and by stat. Westm. 2 (13 Edw. I. c. 19) it was enacted that the Ordinary should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that executors were bound in

(a) 2 Bl. Com. 494.

case the deceased had left a Will. The residuum, however, remained still in his hands to be applied to whatever purposes the conscience of the Ordinary should approve, and to prevent abuses of this power the stat. 31 Edw. III. s. 1, c. 11, was passed, which provides that "In case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods; which person so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the dead; and shall answer also in the King's Court to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

This is the origin of administrators. They were the officers of the Ordinary appointed by him in pursuance of the statute, and their title and authority were derived exclusively from the ecclesiastical judge, by grants which are usually denominated letters of administration (b).

Administrators were officers of the Ordinary appointed pursuant to 31 Edw. III. st. 1, c. 11.

Stat. 21 Hen. VIII. c. 5, s. 3, extended the power of the Ordinaries under 31 Edw. III. st. 1, c. 11, to grant administration in case of a person dying intestate, or the executors named refusing to prove the Will, to the widow or next-of-kin of the deceased, or to both at discretion, and where divers persons claim the administration as next-of-kin in equal degree of kindred to the testator or person deceased it gave the Ordinary power to elect any one or more making request.

Powers extended by 21 Hen. VIII. c. 5, s. 3.

By s. 3 of the Court of Probate Act, 1857, the jurisdiction of ecclesiastical and other Courts to grant letters of administration was abolished, and by s. 4 became vested in the Court of Probate, and by the Judicature Act, 1873, ss. 3, 16 (6), it is now vested in the Probate Division of the High Court of Justice (c).

Jurisdiction subsequently transferred to Court of Probate, and now vested in Probate Division.

(b) See Williams (10th ed.) 312 *et seq.* for a more complete statement of the origin of administration.

(c) See *ante*, pp. 65 *et seq.*

SECT. 2.—*What may be done before grant.*

General rule
administrator
cannot act
before grant.

Inasmuch as the administrator derives his authority from the appointment of the Court, as a general rule he cannot act before letters of administration granted to him (*d*).

A release, an assignment, or a surrender by a person who afterwards takes out letters of administration is of no validity, for the right was not in him at the time (*e*); so also a notice to be given by the executors or administrators of a deceased partner cannot be effectually given by the administrator before taking out letters of administration (*f*).

To what
extent grant
relates back.

In Chancery proceedings it would seem that a person having the right to administer is, as to suing, in a similar position to an executor, that is to say, if the grant is made to him before the hearing it will relate back to the death of the intestate (*g*); yet notwithstanding s. 25 (1) of the Judicature Act, 1873, it would seem that an administrator cannot commence an ordinary action to recover a debt or damages until the letters of administration have issued (*h*).

In some cases acts of a person who afterwards takes out letters of administration are made good by relation. For instance, in *Kenrick v. Burges* (*i*) the Court agreed that if one enters as executor of his wrong, and sells goods and then obtains administration, the sale is good by relation; and *Sharland v. Mildon* (*k*) shows that if, before administration is taken out, an agent is employed, the agency is not lawful so long as the employer is a wrong-doer, but if the employer becomes administrator, then all that has been done is made right. But in such cases the act done must be for the benefit of the estate (*l*).

(*d*) *Wankford v. Wankford*, (1698) 1 Salk. 299, 301.

(*e*) *Williams* (10th ed.) 315.

(*f*) *Holland v. King*, (1848) 6 C. B. 727; and see *Dibbins v. Dibbins*, [1896] 2 Ch. 348.

(*g*) *Humeys v. Humphreys*, (1734) 3 Wms. 349, 351.

(*h*) *Bullen & Leake's Prec. of Plead.* (6th ed.) p. 167.

(*i*) (1582) Moo. 126.

(*k*) (1846) 5 Hare 469, and see *Hill v. Curtis*, (1865) L. R. 1 Eq. 90, 100.

(*l*) *Morgan v. Thomas*, (1853) 17 Jur. 283.

SECT. 3.—*To whom Administration is to be Granted.*

The right of the husband to be the administrator of his wife belongs to him exclusively of all other persons, and the Ordinary had no power or election to grant it to any other. It would seem that this claim is founded on the stat. of 81 Edw. III., on the ground of the husband being "the next and most lawful friend" of his wife (*m*). This right was expressly confirmed by stat. 29 Car. II. c. 8, s. 25.

(1) Right of husband.

Although a married woman has the power of disposing by Will of her separate property, yet the quality of separate property ceases on the death of the married woman without making a disposition, and her undisposed of property devolves just as if the separate use had never existed. The Married Women's Property Act, 1882, has not made any alteration in this respect. If she has made a Will appointing executors, they become trustees for her surviving husband of the personal property undisposed of (*n*).

As to separate property of wife.

According to the equitable doctrine of separate use, if the husband survives and the wife dies in actual possession of her separate property without having exercised her right of disposing of it, the fund belongs to the husband in his marital right, so that he need not become her administrator in order to entitle himself to it. It is otherwise under the Married Women's Property Act, 1882, as thereunder the wife takes as a *feme sole*, and the husband surviving, not having taken any legal interest, must obtain a grant of administration. In the latter case the statute defeats the husband's *jus mariti*, and he must take administration to his wife's estate, whereas in the former the quality of separate property ceases on the wife's death, and consequently the right of the husband (the *jus mariti*) subsists as if the separate use had never existed (*o*).

When husband entitled in his marital right.

When not so entitled.

Though a marriage be voidable by reason of some canonical disability (*e.g.*, on account of corporal infirmities, and formerly

Where marriage voidable.

(m) Williams (10th ed.) 320.

(o) Williams (10th ed.) 521, n. (y).

(n) *Re Lambert's Estate*, (1888) 39 C. D. 626.573, n. (m), 655, n. (r); *Lush on H. & W.* (2nd ed.) 148.

Where marriage void *ab initio*.

as being within the prohibited degrees of consanguinity or affinity), yet the husband is entitled to the administration of the wife, unless sentence of nullity was declared before her death. But where the marriage took place under one of the civil disabilities (such as prior marriage, want of age, idiocy, and the like, and since 5 & 6 Will. IV. c. 54, by being within the prohibited degrees of consanguinity or affinity) the contract of marriage is absolutely void *ab initio*, and consequently the husband cannot be entitled to take administration (*p*).

Where marriage dissolved.

A divorced spouse, whether petitioner or respondent, ceases to have an interest in the estate of the other party to the dissolved marriage who subsequently dies intestate; and, in such a case, the Court will pass over the surviving spouse without citation, but in granting administration to the next-of-kin, will require the sureties to the administration bond to justify (*q*).

Where wife judicially separated or has obtained protection order.

Where a wife has been judicially separated or has obtained a protection order under stat. 20 & 21 Vict. c. 85, s. 21, and afterwards dies in the lifetime of her husband, intestate, the Court will decree administration, limited to such property as she acquired since the judicial separation or protection order (without specifying of what that property consisted), to the next-of-kin of the wife; as to the remainder, administration will be granted to the husband (*r*); and in making the grant to the next-of-kin it is not necessary that the husband should be cited (*s*).

Where husband is bankrupt.

The right of the husband to administer to his wife's estate is not a right which passes to his trustee in bankruptcy, but under special circumstances the Court may make the grant to the trustee under s. 73 of the Court of Probate Act, 1857, and if the estate is small will dispense with citation on the husband (*t*).

Effect of Land Transfer Act, 1897, on husband's right.

Since the Land Transfer Act, 1897, if a wife dies possessed

(*p*) Williams (10th ed.) 321.

(*q*) In the Estate of Wallas, [1905] P. 326.

(*r*) Williams (10th ed.) 321.

(*s*) In the Goods of Brighton, (1865) 34 L. J. (P. M. & A.) 55.

(*t*) In the Goods of Turner, (1886) 12 P. D. 18.

of real estate the heir-at-law has under the Act (u) an equal right to the grant of administration with the next-of-kin. The Act, however, does not refer to the husband, and being entitled to administration *jure mariti*, and not as next-of-kin, he is not affected by the Act, but in a proper case he may be passed over under s. 78 of the Court of Probate Act, 1857 (x).

The husband is not entitled to the grant if he has no interest in his deceased wife's property. So that where a husband agreed by deed of separation that if his wife died intestate her next-of-kin should be entitled to her property, and she died intestate, leaving separate property of which she had become possessed by virtue of the deed, the Court, notwithstanding the husband objected, granted letters of administration to her father limited to that property (y).

Husband has no right if he has no interest.

If the husband survives his wife and dies, the practice of the Court in all cases where there is only personal estate is to grant to the representative of the husband alone letters of administration to the wife, unless the next-of-kin are entitled by contract or otherwise to the beneficial interest, when it will be decreed to them, because the principle is that the grant ought to follow the interest. But before the husband's next-of-kin can claim to administer to the wife's estate they must constitute themselves his legal personal representatives (z).

Right of personal representative of husband.

Since the passing of the Land Transfer Act, 1897, it would seem that where the wife predeceases the husband leaving real estate the heir-at-law of the wife has priority over the personal representative of the husband (a).

Heir-at-law of wife has priority if she has left real estate.

Although the stat. 21 Hen. VIII. c. 5, s. 8, directs the Ordinary at his discretion to grant administration to the widow of the deceased, or to the next-of-kin, or to both, it is the practice of the Court to give priority to the widow, unless good cause is shown to the contrary; for instance, having

(2) Right of widow.

(u) 60 & 61 Vict. c. 65, Pt. I., s. 2, sub-s. 4.

P. D. 16.

(x) In the Goods of Arden, [1898] P. 147.

(z) Partington v. Att.-Gen., (1869) L. R. 4 H. L. 100, 109, 115.

(y) Allen v. Humphrys, (1882) 8

(a) In the Goods of Roberts, [1898] P. 149.

barred herself of all interest in her husband's property by contract, or marital misconduct (b).

Court prefers
a sole to a
joint adminis-
tration.

The Court at all times prefers a sole to a joint administration (c), and where a joint grant is made to the widow and one of the next-of-kin, all the other next-of-kin must consent that the grant shall be so made; and the Court will not depart from the general practice, unless there are special circumstances for so doing (d).

Effect of
marital
misconduct.

On an application for a grant of administration passing over the widow on the ground of misconduct, the Court requires the widow to be cited to give her the opportunity of answering the charge (e), unless there are special circumstances (f).

But where a charge of marital misconduct had been established in a suit by the intestate who had obtained a decree *nisi* for the dissolution of his marriage, the Court made the grant to the son without requiring the widow to be cited, but the sureties to the administration bond had to justify in respect of the share of the estate to which the widow might be entitled in order that her interest in the estate might be absolutely protected (g).

But the Court will not, without citation, pass over the widow, who has been legally separated from her husband by reason of her cruelty (h).

Widow being
lunatic.

Where the widow is a lunatic her committee is entitled preferably, in like manner as the widow would be, unless good cause to the contrary is shown by the next-of-kin. If there is no committee of her estate, administration is granted to the widow's next-of-kin, or to the next-of-kin of the husband, according to circumstances, or in cases coming within the

(b) Williams (10th ed.) 327; In the Goods of Stevens, [1898] P. 126.

(c) See *post*, p. 104.

(d) In the Goods of Newbold, (1866) L. R. 1 P. & D. 285; In the Goods of Richards, (1871) L. R. 2 P. & D. 216; In the Goods of Dickinson, [1891] P. 292.

(e) In the Goods of Middleton,

(1888) 14 P. D. 23.

(f) In the Goods of Stevens, *ubi sup.*

(g) In the Estate of Frost, [1905] P. 140; as to a divorced spouse, see *ante*, p. 98.

(h) In the Goods of Ihler, (1873) L. R. 3 P. & D. 50.

Land Transfer Act, 1897, to the heir-at-law, if he is the person principally interested (i).

Inasmuch as the principle upon which the Court acts is that the grant of administration ought to follow the interest, the decided cases determining who are next-of-kin according to the Statutes of Distribution are authorities upon the question as to who are entitled to administration as being next-of-kin under the Statutes of Administration (k).

(3) Right of next-of-kin.

Next-of-kin according to Statutes of Distribution entitled.

Consanguinity, or the relation of persons descended from the same stock or common ancestor, is either lineal or collateral.

Consanguinity.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between the propositus and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between the propositus and his son, grandson, great grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards. The father of the propositus is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second, his great grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon, as in the common law (l).

Lineal consanguinity.

Mode of calculating.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other (m).

Collateral consanguinity.

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next-of-kin, so as to be entitled to administration, conforms to that of the civil law, and is as follows: to count upwards from either of the

Mode of calculating.

(i) Williams (10th ed.) 327.

(l) Williams (10th ed.) 329.

(k) See Williams (10th ed.) 328 *et seq.*

(m) *Ibid.*

parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or, in other words, to take the sum of the degrees in both lines to the common ancestor (*n*); so that the *propositus* and his cousin-german or first cousin are related in the fourth degree, and the *propositus* and his second cousin are related in the sixth degree. Moreover, relations of different denominations may be of equal degree to the *propositus*. Thus a grand-daughter of the sister, and a daughter of the intestate's aunt (*i.e.*, a great-niece and a first cousin) are in equal degree, being each four degrees removed.

The following distinctions may be observed with reference to the corresponding rules of the common law respecting succession to inheritances (*o*).

Paternal and maternal relations equally entitled.

Half-blood.

Primogeniture gives no preference.

Right to administration follows proximity of kindred.

Collaterals preferred to more remote lineals.

Exceptions to rule that all in equal degree equally entitled.

Relations by the father's side and the mother's side are in equal degree of kindred, and therefore equally entitled to administration.

The half-blood is admitted to administration as well as the whole.

Primogeniture gives no right to preference in the grant of administration.

The right to administration will follow the proximity of kindred, though ascendant; and, therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the grant, exclusive of all others. If a child dies intestate without a wife, child or father, the mother is entitled to administration. So the grandfather or grandmother, being in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the third degree. So a great-grandmother is equally entitled with an aunt.

Our law prefers the next-of-kin, though collateral, before one who, though lineal, is more remote.

Although, as a general rule, those in equal degree, whether male or female, are equally entitled to administration, yet

(*n*) Williams (10th ed.) 330.

(*o*) See Williams (10th ed.) 331,

where these distinctions are given and the authorities collected.

there is a recognised order of preference among kindred which is an exception to this rule.

The order of preference is as follows: In the first place the children, and their lineal descendants to the remotest degree; and on failure of children, the parents of the deceased are entitled to the administration; then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins (*p*). Order of preference.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (4), where a person dies possessed of real estate, in granting letters of administration the heir-at-law if not one of the next-of-kin shall be equally entitled to the grant with the next-of-kin (*q*). (4) Right of heir-at-law.

Where two parties contest the right to administration before any grant has been made, both propound their interests and proceed *pari passu* (*r*). (5) In case of contest parties propound their interests and proceed *pari passu*.

Where there are several persons standing in the same degree of kindred to the intestate the Court has under the statute a discretion to accept any one or more of such persons (*s*). Power of Court to elect where several in equal degree.

Where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of that person, amongst those of the same kindred, to whom the majority of parties interested are desirous of entrusting the estate (*t*). Practice as to election.

Ceteris paribus, by the practice of the Court, preference is given to one of the whole blood over one of the half blood (*u*), to males over females (*x*), to seniority as between brothers (*y*)

(*p*) Williams (10th ed.) 333, and see the authorities there collected.

(*q*) Probate Rule, 109 (Nov. 20th, 1897), adapts the procedure and practice in the grant of letters of administration to the case of real estate.

(*r*) Williams (10th ed.) 334; as to the practice in interest actions see Tr. & Co. P. P. (14th ed.) 380, 363.

(*s*) See P. R. 1862, r. 28, as to notice required to be given to other

next-of-kin.

(*t*) Williams (10th ed.) 335, and see In the Goods of Stainton, (1871) L. R. 2 P. & D. 212; Sawbridge v. Hill, (1871) L. R. 2 P. & D. 219.

(*u*) Stratton v. Linton, (1861) 31 L. J. P. M. & A. 48.

(*x*) Cordeux v. Trasler, (1865) 4 Sw. & Tr. 51.

(*y*) Warwick v. Greville, (1809) 1 Phillim. 125.

or sisters (*s*), and to a man accustomed to business (*a*); but such considerations will not weigh against the wish of the majority of interests and are subject to the rule to make the grant to the first applicant (*b*).

The fact of one of several next-of-kin being also a creditor is a reason against his being preferred in a contest for the administration (*c*).

Where no contest.

Where there is no contest the Court will make the grant *priori petenti*, i.e., to the first applicant (*d*), but may require notice to be given to the other next-of-kin (*e*).

Sole preferred to joint administration.

The Court prefers a sole to a joint administration (*f*).

Grant not made to more than three except to testamentary guardians.

Where a joint grant is made the Court will not, generally speaking, make the grant to more than three, except in the case of testamentary guardians (*g*).

Administration once committed others in same degree precluded.

When administration has been once committed to any of the next-of-kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant (*h*).

(*g*) Next-of-kin excluded if he has no interest.

In disregard of the express words of the statutes, but with the view to furthering their object by giving the management of the property to the person who has the beneficial interest in it, the next-of-kin is excluded if he has no interest, for instance if he has assigned away his interest, and the grant will be made to the party beneficially entitled. So also with respect to administration *cum testamento annexo*, the grant will be made to the residuary legatee (*i*).

Direct interest preferred to derivative interest.

The general practice is that a party having a direct interest, that is originally entitled in distribution, is preferred to a person having a derivative interest, but the matter is in the discretion of the Court (*j*). Before exercising its discretion

(*c*) *Coppin v. Dillon*, (1833) 4 Hagg. 376.

(*a*) *Williams v. Wilkins*, (1812) 2 Phillim. 100.

(*b*) *Cordeux v. Trasler*, *ubi sup.*

(*e*) *Webb v. Needham*, (1823) 1 Add. 494.

(*d*) *Cordeux v. Trasler*, *ubi sup.*

(*e*) P. R. 1862, r. 28.

(*f*) See *ante*, p. 100.

(*g*) Tr. & Co. P. P. (14th ed.) p. 186.

(*h*) *Williams* (10th ed.) 337.

(*i*) See *Williams* (10th ed.) 345 *et seq.*

(*j*) In the Goods of Carr. (1867 L. R. 1 P. & D. 291.

in favour of a person having a derivative interest the Court will require the person entitled in distribution to be cited, unless in a particular instance citation is dispensed with (*k*).

By P. R. 1862, r. 32, "In the case of a person residing out of England administration, or administration with the Will annexed, may be granted to his attorney acting under a power of attorney." Where a person entitled to the grant is resident in this country, and able but unwilling to take it himself, the Court will not make the grant to his attorney for his use and benefit (*l*).

(7) Grant to attorney of person entitled residing out of England.

Such an administrator is liable to be sued in respect of the estate of the intestate, by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right (*m*). But until he is sued he may hand over the money to the person for whose use and benefit the letters were granted (*n*) without such person taking out letters of administration in this country (*o*). But he cannot obtain a good discharge from his principal where the principal is not legal personal representative in any country, since the attorney is responsible himself for the due administration of the assets (*p*).

Position of attorney administrator.

The form of the grant is for the use and benefit of the principal and until he shall duly apply for and obtain letters of administration of the estate to be granted to him (*q*). It ceases on the death of the principal, and the succeeding grant is in the form of letters *de bonis non* (*r*).

By the practice of the Court if none of the next-of-kin will take out administration a creditor may, since he cannot be paid his debt until representation to the deceased is made (*s*), but

(8) Grant to creditor.

(*k*) In the Goods of Kinchella, [1894] P. 264.

(*l*) In the Goods of Burch, (1861) 2 Sw. & Tr. 139; and see *post*, p. 124, as to grant to attorney of executor *durante absentia*.

(*m*) Chambers v. Bicknell, (1843) 2 Hare, 536.

(*n*) Att.-Gen. v. Köhler, (1861) 9 H. L. C. 654; James v. Hacon, (1881)

18 C. D. 347.

(*o*) De la Viesca v. Lubbock, (1840) 10 N. S. 329.

(*p*) See Rendell, [1901] 1 Ch. 230.

(*q*) See Tr. & Co. P. P. (14th ed.) pp. 99 *et seq.* and p. 891.

(*r*) *Ibid.*, p. 152.

(*s*) Williams (10th ed.) 350; Webb v. Needham, (1823) 1 Add. 494.

by the present form of bond he is prevented from preferring his own debt (*t*).

Practice with regard to assignee of debt.

It is the established practice of the Court to refuse to grant administration as creditor to a person who has bought up a debt after the death of the deceased. But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased who has assigned it, by way of mortgage or otherwise, to the party seeking the grant (*u*), nor with a grant to the trustee in bankruptcy (*x*), or to the assignee from the trustee in bankruptcy of a creditor (*y*).

Surety paying debt of creditor.

A surety who, after the death of the principal, pays off the debt, is, in the case of intestacy, entitled to a grant of letters of administration as a creditor of the intestate debtor (*z*).

Undertaker for funeral expenses.

The Court may grant administration to the undertaker, as creditor for funeral expenses, but such applications are not favoured, and the Court will not make the grant unless it is informed of the circumstances under which the expenses were incurred, and by whose authority the applicant undertook the funeral (*a*).

(*g*) Wanting next-of-kin or creditors to take, Court has discretion to make grant to any person.

For want as well of creditors, as of next-of-kin, desirous to take out administration, the Court may grant it to any person at its discretion (*b*).

In a case where the widow and all the next-of-kin and persons entitled in distribution, having been cited, did not appear, the Court made a general grant of administration to the receiver appointed in administration proceedings in Chancery (*c*). And in a case where the widow of the intestate was a lunatic, and his only other next-of-kin, his brother, was unable to furnish qualifying security, and a suit having been instituted in the Chancery Division for administration

(*t*) See *post*. p. 332.

(*u*) Williams (10th ed.) 353.

(*x*) Downward v. Dickinson, (1864) 3 Sw. & Tr. 564.

(*y*) In the Goods of Burdett, (1876) 1 P. D. 427.

(*z*) Williams v. Jukes, (1864) 34

L. J. P. M. & A. 60.

(*a*) Newcombe v. Beloe, (1867) L. R. 1 P. & D. 314.

(*c*) Williams (10th ed.) 354.

(*c*) In the Goods of Mayer, (1873) L. R. 3 P. & D. 39.

and a receiver appointed, the grant was made to the receiver (*d*).

Where there were no known relatives, and the Will did not appoint a residuary legatee, having regard to special circumstances, the Court made the grant, with the Will annexed, limited to the estate disposed of by the Will, to a stranger (*e*). So also where the sole next-of-kin of an intestate was lunatic, her committee having renounced, the Court, with the consent of the next-of-kin of the lunatic and approval of the Master in Lunacy made the grant to a stranger in blood (*f*).

Where it is for the benefit of absent or unknown next-of-kin the Court will grant letters of administration *ad colligendum* with power to dispose of the property or of any portion of it by sale (*g*); and since the Land Transfer Act, 1897, such grants may be made applicable to real estate, with liberty to let and manage farms till the heir-at-law can be cited (*h*).

Administration *ad colligendum* where next-of-kin or heir-at-law is absent or unknown.

If a bastard die intestate, and without wife or child, the King is entitled to his goods as *ultimus heres*, not in a fiduciary character but beneficially; subject nevertheless to the debts of the intestate. Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the Crown, with a reservation as it is said, of a tenth, or other small proportion of the property, and then the Court grants to such appointee the administration (*i*).

(10) Bastard dying intestate without wife or child.

When a bastard dies in part intestate the Crown has a right to a *ceterorum* grant, but not to a general grant of administration, and the legatees have a right to a grant with the Will annexed limited to the property disposed of by the Will (*k*).

Bastard dying partly testate.

By the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), the Treasury Solicitor is constituted a corporation sole with certain powers and liabilities, and by s. 2 of the Act where the Crown becomes entitled to the personal estate of an

Effect of the Treasury Solicitor Act, 1876.

(*d*) In the Goods of Moore, [1892] P. 145.

(1876) 1 P. D. 424.

(*e*) In the Goods of Jackson, [1892] P. 257.

(*k*) In the Goods of Roberts, [1898] P. 149.

(*f*) In the Goods of Hastings, (1877) 4 P. D. 78.

(*i*) Williams (10th ed.) 341.

(*g*) In the Goods of Schwerdtfeger,

(*k*) In the Goods of Rhoades, (1866) L. R. 1 P. & D. 119.

intestate, and the Court has power to grant administration to a nominee of the Crown, and the Treasury Solicitor is so nominated, the Court may grant administration for the use of the Crown to the Treasury Solicitor (by his official name) and his successors, or if the warrant so provide, to some person nominated by the Treasury Solicitor.

Effect of the
Intestate
Estates Act,
1884, as to
proceedings.

Under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 2, where the administration of the personal estate of any deceased person is granted to a nominee of the Crown proceedings by or against such nominee are carried on in the same manner in all respects as if the administration had been granted to such nominee as one of the next-of-kin of such deceased person.

As to law of
escheat.

Sect. 4 enacts that "from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditaments, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the Will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

Effect of the
Land Trans-
fer Act, 1897,
as to escheat.

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not bind the Crown, and, therefore, the legal estate in escheated land does not, under s. 1, vest in the Treasury Solicitor as nominee of the Crown. Accordingly where a widow had died after the commencement of the Act, a bastard and intestate, and entitled to both real and personal estate, a grant was made to the Treasury Solicitor of her personal estate only, as before the Act (*l*).

In *In the Goods of Ball* (*m*), where the sole executrix and universal legatee and devisee had predeceased the testator and the title of the Crown to escheated lands arose, the grant was made to a creditor in the ordinary form—that is, to all the estate which by law devolves to and vests in the legal personal

(*l*) In the Goods of Hartley, [1899] P. 40.

(*m*) (1902) W. N. 226.

representative of the deceased, leaving the question of law open.

In the case of a felon convict, since the stat. 33 & 34 Vict. c. 28 (n), administration is no longer granted as formerly to a nominee of the Crown, but follows the ordinary course of the law of succession *ab intestato* (o); and if the felon convict is sole next-of-kin it would seem the grant should be made to an administrator or interim curator appointed under the Act limited to the period during which the convict shall be subject to the operation of the Act, or to the Public Trustee under s. 2 (1) of the Public Trustee Act, 1906 (oo).

(11) Grant where felon convict entitled.

The Court of Probate Act, 1857, s. 73, provides that "where a person has died or shall die wholly intestate as to his personal estate, or leaving a Will affecting personal estate but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof; but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit."

(12) In case of special circumstances.

The operation of this section is not restricted to insolvent estates. Insolvency of the estate is only given as an

(n) *Ante*, p. 21.

(o) Williams (10th ed.) 345; Tr. &

Coo. P. P. (14th ed.) p. 113.

(oo) See Appendix.

example (*p*). It applies to all cases within the section where there are special circumstances to justify it (*q*); and the Court ought, as far as it can, to use the power conferred on it by this section for the purpose of expediting and rendering as economical as possible the administration of the estates of deceased persons (*r*).

Where the insolvency of the intestate's estate is disputed, and there is any doubt as to the fact, the Court will not exercise the power conferred by this section by passing over a person entitled to the grant (*s*), unless there are also other special circumstances (*t*).

(13) Public
Trustee.

Where the intestate's estate is not known or believed to be insolvent, the Public Trustee, under s. 6 (1) of the Public Trustee Act, 1906, is equally entitled with any other person or class of persons to obtain the grant, except that as between the Public Trustee and the widower, widow, or next-of-kin of the deceased, the widower, widow, or next-of-kin shall be preferred, unless for good cause shown to the contrary (*tt*).

SECT. 4.—Citation.

General rule.

As a general rule, whenever a party has a right to the administration, he must be cited or consent, although he may have no interest in the property, before the Court will make the grant to a third party (*u*).

When dispensed with.

But under s. 73 of the Court of Probate Act, 1857, a grant of administration may be made without citing a person entitled in distribution (*x*); and accordingly in the case of a small estate, the Court dispensed with the citation of the next-of-kin on proof that they had notice of the application (*y*),

(*p*) In the Goods of Farrands, (1876)
1 P. D. 439.

(*q*) For a list of cases in which the Court has considered that the circumstances warranted the exercise of the power under this section, see Williams (10th ed.) 356, n. (*h*).

(*r*) In the Goods of Grundy, (1868)
L. R. 1 P. & D. 459.

(*s*) Hawke v. Wedderburne, (1868)
L. R. 1 P. & D. 594.

(*t*) In the Goods of Farrands, *ubi sup.*
(*tt*) See Appendix.

(*u*) In the Goods of Barker, (1837)
1 Curt. 592. With regard to the practice as to service of citations see Rules 69 and 70, P. R. 1862 (Non-contentious).

(*x*) In the Goods of Kinchella,
[1894] P. 264.

(*y*) In the Goods of Teece, [1896]
P. 6.

and also dispensed with citation by advertisement where the estate was small and the next-of-kin had not been heard of for many years; but the applicant for the grant was required to swear he believed himself to be sole next-of-kin and the sureties were required to justify (z).

Under s. 6 (1) of the Public Trustee Act, 1906, the consent or citation of the Public Trustee is not required.

When the next-of-kin is of unsound mind, the practice is that his next-of-kin must also be cited, in order that they may take administration for his use and benefit if they think proper (b).

Next-of-kin
of unsound
mind.

SECT. 5.—*When the grant may issue.*

By rule 44, P. R. 1862 (non-contentious business) no letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars.

Letters not to
issue till after
14 days from
death with-
out special
order.

By rule 45, in every case where probate or administration is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars; and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit.

After three
years cause of
delay to be
certified.

SECT. 6.—*Statutory provisions facilitating obtaining or dispensing with grant in certain cases of small estates.*

By the Intestates' Widows and Children Act, 1873 (36 & 37 Vict. c. 52), where the estate of an intestate does not exceed in value £100, his widow or any one or more of his children, should such widow or children respectively reside at a distance exceeding three miles from the probate registry having jurisdiction, may apply to the registrar of the County Court within the district where the intestate had his fixed abode, and the registrar shall obtain for and deliver to the party applying the letters of administration without the payment of any fee for the same.

The Intes-
tates'
Widows and
Children
Act, 1873.

(z) In the Goods of Reed, (1874) 29 L. T. N. S. 932; In the Goods of John Callicott, [1899] P. 189.

(b) Windeatt v. Sharland, (1871) L. R. 2 P. & D. 217.

Extended to
poor widow
dying intestate.

By 38 & 39 Vict. c. 27 the provisions of the last mentioned Act were extended to the surviving children of a poor widow who dies intestate.

Public
Trustee Act,
1906.

The Public Trustee Act, 1906, moreover, authorises the Public Trustee to act in the administration of estates of small value (*bb*).

Naval assets.

Stat. 28 & 29 Vict. c. 111 as extended by 47 & 48 Vict. c. 44, and amended by 60 Vict. c. 15, and the Order in Council of December 28, 1865, make provision for the disposal by the Admiralty of naval assets, or sums due by the Admiralty, on the death of any officer, seaman, or marine, or other person employed in dockyards, or naval establishment, or in any of the civil departments of the Navy, or entitled to allowance, gratuity, or pension, and in case of sums under £100 no representation to the deceased is necessary, and the Admiralty is given power to dispose thereof in manner prescribed by the Act and Order in Council.

Wages and
property of
merchant
seamen.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 176, the wages and property of merchant seamen or apprentices, not exceeding in value £100, subject to the provisions thereafter contained and to such deductions as the Board of Trade think proper to allow, may be paid over by the Board of Trade to the persons entitled as therein mentioned, without representation being obtained. And by s. 178 provision is made for payment by the Board of Trade of just claims by creditors.

Deposits in
savings banks
for seamen.

Stat. 19 & 20 Vict. c. 41, s. 5, made similar provision relating to deposits in savings banks for seamen established under the Act.

Pension or
prize money
of deceased
seamen.

Stat. 11 Geo. IV. and 1 Will. IV. c. 41, s. 5 (as amended by 26 & 27 Vict. c. 57, s. 3, and 31 & 32 Vict. c. 90, s. 2) provides for payment by the Commissioners of the Chelsea Hospital of any pension or prize money not exceeding £100 without administration or probate.

Prize money
of deceased
soldiers.

Stats. 2 & 3 Will. IV. c. 58, 27 & 28 Vict. c. 36, and 31 & 32 Vict. c. 90, s. 2, make similar provision relating to the payment of prize money of deceased soldiers.

Effects of
officers and

Stats. 26 & 27 Vict. c. 57, s. 15, and 47 & 48 Vict. c. 55,

(*bb*) See Appendix.

s. 4, make provision for payment of the residue of the personal estate of officers and soldiers where it does not exceed £100 without any representation being taken out to them; and by s. 16 of the former Act provision is made for the disposal of such residue after the expiration of three months in the case of an officer and one month in the case of a soldier.

soldiers not exceeding £100.

Stat. 50 & 51 Vict. c. 67, s. 8, provides that sums not exceeding £100 due from a public department in respect of any civil pay, superannuation, or other allowance, annuity or gratuity to any deceased person may, if the prescribed public department so direct, but subject to any regulations made by the Treasury, pay over the same as there directed without representation obtained.

Civil pay, superannuation or other allowances not exceeding £100.

By 3 & 4 Vict. c. 110, s. 11, in the case of the intestacy of a debenture holder, depositor or other claimant entitled to receive any sum not exceeding £50 out of the funds of a Loan Society, entitled to the benefit of the Act, the same may be paid as provided without representation obtained.

Sums not exceeding £50 due from Loan Society

By 37 & 38 Vict. c. 42, s. 29, in the case of Building Societies under the Act, a sum not exceeding £50 due to any member or depositor who dies intestate may be paid as provided without representation obtained; and similarly having regard to s. 7, in the case of Building Societies still governed by 6 & 7 Will. IV. c. 32, sums not exceeding £20 may be paid over.

Sums not exceeding £50 due from Building Society.

In the case of depositors in Trustee or Post Office Savings Banks, it is provided by the regulations made in accordance with 50 & 51 Vict. c. 40, s. 3, for the nomination by depositors, not being under sixteen years of age, of any person to whom any sum, not exceeding in the aggregate £100 payable to such depositor at his decease, is to be paid at such decease, and, in the absence of nomination, for the payment without representation obtained to the persons and in the manner specified by the regulations (c). Similar provisions for nomination or payment of sums not exceeding £100 without representation obtained have been made in the case of members of Friendly Societies:

Nominations not exceeding £100 by depositors in Trustee or Post Office Savings Banks;

or by members of Friendly Societies:

(c) See further as to the Acts above referred to, Williams (10th ed.) 363 *et seq.*

or Trade
Unions ;

or Industrial
and Provident
Societies.

Fund in
Court where
total assets do
not exceed
£100.

Societies by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58 ; in the case of members of registered Trade Unions by 89 & 40 Vict. c. 22, s. 10, as amended by 59 & 60 Vict. c. 25 ; and in the case of members of Industrial and Provident Societies by the Industrial and Provident Societies Act, 1898 (56 & 57 Vict. c. 39), s. 27.

By Ord. 22, r. 18A of R. S. C., July, 1902, "Where the estate of a deceased person who has died intestate is entitled to a fund or to a share of a fund in Court not exceeding £100, and it is proved to the satisfaction of the Court or a judge that no administration has been taken out to such deceased person, and that his assets do not exceed the value of £100, including the amount of the fund or share to which the estate of such deceased person is entitled, the Court or a judge may direct that such fund or share of a fund shall be paid, transferred, or delivered to the person who, being a widower, widow, child, father, mother, brother, or sister of the deceased, would be entitled to take out administration to the estate of such deceased person."

Prior to this rule, and under the old practice, the Court would distribute a share of residue under £20 without requiring administration to be taken out (d).

SECT. 7.—Of what the grant is evidence.

Conclusive as
to the right
of representa-
tion :

A grant of letters of administration, as in the case of probate (e), is conclusive until revoked as to the right of representation, and where administration purports to be granted to a person as next-of-kin, and it should subsequently appear that he was not the next-of-kin, application must be made to the Probate Division to revoke its grant, but until revoked the grant is binding on every other Court (f).

also that
person to
whom grant
is made is the
next-of-kin.

Moreover, if after citation and upon hearing the parties the Probate Division has determined that the person to whom the grant was made was the next-of-kin, that question cannot be re-opened in any other division of the High Court (g).

(d) *Frogley v. Phillips*, (1901) W. N. 243.

(e) *Ante*, p. 88.

(f) *Re Ivory*, (1878) 10 C. D. 372.

(g) *Ibid.*, per Lush, J., at p. 375.

CANADIAN NOTES.

Letters of administration must be under seal, but no particular impression is necessary; any seal used by the Surrogate for the purpose is sufficient till a particular seal is provided. *Crookshank v. Giberson* (1853), 7 N.B.R. 544. Seal.

The validity of letters of administration cannot be impeached indirectly. *Kerr v. McLellan* (1875), 9 N.S.R. 502. Actions by administrator.

When a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action. *Chard v. Rae* (1889), 18 O.R. 371.

The grant of letters of administration by the proper Court is conclusive while unrevoked upon the question of the right to them. Letters of administration issued after action and before the trial, where the plaintiff brings his action as administrator, are sufficient to support the action, even where the plaintiff has no interest in the estate. *Dini v. Fanquier* (1904), 8 O.L.R. 712. Letters of administration rightly granted to the plaintiff as widow related back to validate the action. *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499. Grant of letters conclusive.

Administration irregularly granted (as to a creditor without citing the next of kin) remains good till revoked by the proper Court. *Crookshank v. McFarlane* (1853), 7 N.B.R. 544.

The Surrogate Courts in this country have the same authority to grant limited administrations as the Probate Court in England has. *In re Thorpe* (1868), 15 Gr. 76. Limited administration may be granted.

The administration of personal property is governed by the law of the *situs*, although the right of succession is governed by the laws of the domicile. *Re O'Brien* (1882), 3 O.R. 329; *Milne v. Moore*, 24 O.R. 456.

The grant of letters of administration is a proceeding *in rem* which cannot be questioned while it stands, if the Court

and jurisdiction and if the person on whose supposed death the administration was issued be really dead. *Jennings v. Grand Trunk R.W. Co.* (1887), 15 App. R. 477; *London and Western Trusts Co. v. Traders Bank* (1908), 16 O.L.R. 382.

Preference to particular applicant.

When applications for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the party nearest in the order in which administration is usually granted, and jurisdiction to proceed was conferred on the Surrogate Court in which application was made by a mother as next of kin against that on behalf of creditors, in another county. *Re Tougher* (1902), 3 O.L.R. 144.

Renunciation.

Letters of administration having once been accepted cannot be renounced without the order of the Court of Probate. *Kaulbach v. Mader* (1902), 35 N.S.R. 219. See *Jost v. McNiel* (1887), 20 N.S.R. 159.

Title relates back.

Letters of administration are evidence of the testator's death. *Scribner v. Gibbon* (1858), 9 N.B.R. 182.

The title of an administrator relates back to the death of the intestate so as to enable him to replevy goods taken before the grant of administration. *Deal v. Potter* (1867), 26 U.C.Q.B. 578.

The rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification, if the specialty can be recovered and enforced in the country where it is found at the death. *Re Ontario Mutual Life Ins. Co. v. Fox* (1899), 30 O.R. 666.

The existence of personal or real estate at the time of death is not essential to the jurisdiction. *Jennings v. Grand Trunk R.W. Co.* (1887), 15 App. R. 477.

Husband's renunciation of marital right bars his right to administer.

Where a husband has before marriage renounced his marital right to a share in the property of his wife the law cannot replace him in the benefit out of which he has contracted himself, and he is not entitled to administration of his wife's estate, for administration follows interest. The administrator of the wife's estate has a status to set up the husband's re-

nunciation in answer to a claim made by him to a share in the estate. *Dorsey v. Dorsey* (1898), 29 O.R. 475, 30 O.R. 183.

In the absence of an application by a party entitled by reason of relationship to the deceased, it is necessary in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate, otherwise the grant should be made to the public administrator for the district. *Re Morton* (1900), 5 Terr. L.R. 409.

Quære,—Whether a Judge can revoke letters of administration once granted for any reason other than mentioned in the statute. *In re Hately* (1884), 17 N.S.R. 375.

The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of jurisdiction, but having an attorney-in-fact within the province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property although he died possessed of considerable real estate within the province subject to a mortgage. *In re Lelaire* (1903), 9 B.C.R. 429.

Official administrator.

The High Court of Justice has no jurisdiction to revoke letters of administration. *McPherson v. Irvine* (1895), 26 O.R. 438.

On an application by a legatee for an order under Rule 766 of the Manitoba Queen's Bench Act, 1895, for administration of a testator's estate, the Court has a discretion to grant or refuse the order, although more than a year has passed since the death of the testator; and when the executors are doing their best to realize the assets and are in no default, the application should be refused. *Re O'Connor, O'Connor v. Fahey* (1898), 12 Man. R. 325.

In a contest for administration *de bonis non* between the next of kin of the deceased administrator, the husband of the intestate, and the next of kin of the intestate, whose status as a petitioner depended on the domicile of the intestate, the Judge of Probate disregarded the fact that letters of adminis-

Administration *de bonis non*.

tration had been issued out of his Court on the estate of the intestate as domiciled in this province, the petition upon which the letters were granted not having been put in evidence or the statements therein relied upon, and he refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the deceased administrator, that at the time of her death the intestate was domiciled in this province, and it was held on appeal that the decision was right, and that administration was properly granted to the representative of the next of kin of the intestate. *Re Forester* (1905), 37 N.B.R. 209.

Letters
relate
back.

The order of the Judge of the proper Surrogate Court on the day the plaintiff as administrator brought his action by the issue of a writ of summons, that letters of administration should be issued to the plaintiff is a judicial act and is such a declaration of the plaintiff's right to obtain letters as would make them, when issued, relate back to the date of the order. *Dini v. Fanquier* (1904), 8 O.L.R. 712.

Where a contract to sell the good will of the intestate's business was made by the administratrix before the grant of the letters of administration it was held that the grant had relation back to the death of the intestate so as to enable the administratrix to sue upon the contract which was for the benefit of the estate. *Christie v. Clarke* (1867), 27 U.C.Q.B. 21.

Appointment
of creditor
discretionary.

The appointment of a creditor as administrator is not as of right but rests in the discretion of the Judge who appoints, and this cannot be interfered with by any peremptory writ. *Re O'Brien* (1884), 3 O.R. 326.

Practice.

The practice of the Surrogate Courts in Ontario has applied the provisions of section 59 of the Surrogate Courts Act, R.S.O. 1897, c. 59, more liberally than do the English Courts, the corresponding provision (section 73) of the English Probate Act. *Carr v. O'Rourke* (1902), 3 O.L.R. 632. "Fraud

and misrepresentation being out of the case, and the Surrogate Court having exercised its discretion in favour of making the grant to the respondent, I doubt whether the case would be one for a revocation of the grant, even if it appeared that the discretion had been improperly exercised." (*Ib.*) per Meredith, C.J. See also *Re Keko* (1906), 7 O.W.R. 825.

The Court will not grant administration to a creditor so long as one having a better claim, such as the next of kin, is willing to act. *Re O'Brien* (1884), 3 O.R. 326. And where the next of kin is dead the established principle is to grant administration to the person having the largest interest. *Re Estate of Cunningham*, 31 N.S.R. 264.

While generally the jurisdiction to grant probate depends upon the existence of estate or effects in the probate district, yet where the testator has no fixed place of abode in, or resides out of Ontario, at the time of his death, and leaves real or personal property in the county of the Surrogate Court of which application is made for probate, or leaving no real or personal property in Ontario, probate may be granted after public notice in the *Gazette*. R.S.O., c. 59, s. 39. *Jennings v. G.T.R. Co.* (1887), 15 App. R. 477; *Re Thorpe* (1868), 15 Gr. 76. See also *Grant v. G.W. R.W. Co.*, 7 C.P. 438, in which case the judgment of Draper, C.J., contains an elaborate review of all relevant cases upon the question of jurisdiction.

The respective claims of the principal creditor and a rival applicant representing a majority of creditors, in an application for letters of administration, are discussed by the Court of Appeal in the case of *In re Estate of Sophia Braine*, (1868), 7 N.S.R. 390.

Claims of
rival
applicants.

The mere fact that the parties interested fail to agree upon the nomination of an administrator affords no ground for the appointment of a stranger, such as a trust company. *Re Estate Mary F. W. Smith* (1896), 28 N.S.R. 221.

Where a will is in notarial form, and in the custody of

a notary in Quebec, letters of administration with a certified copy of the will annexed will be granted on proof by affidavit of the death and domicile of the testator, of the law of Quebec and of the original will being executed in accordance therewith, that the original will is in the custody of a notary of that province, and that the executors named in the will are acting thereunder. *In re Robertson* (1902), 22 C.L.T. Occ. N. 211. See *Re Maclaren*, 22 App. R. 18.

CHAPTER VII.

OF SPECIAL AND LIMITED ADMINISTRATIONS.

SECT. 1.—*Administration cum testamento annexo.*

THIS arises where the deceased has left a Will without appointing an executor or the appointment of executor fails.

The appointment of executor fails—

- (1) Where he is incapable of acting, or refuses to act and renounces, or does not appear to a citation served on him (a);
- (2) Where he dies before the testator or before proving the Will. Even if the executor acts, but dies before probate, the chain of representation is broken, and administration with the Will annexed must be granted (b);
- (3) Where after proving and being sole or sole surviving executor he dies intestate before fully administering.

When appointment of executor fails.

Wherever there is a Will but there is a mesne time during which there is no executor appointed or no executor capable of acting, grant of administration with the Will annexed must be obtained in the meantime (c).

Interval of no appointment.

The Will to which the administration is annexed must be similarly proved as though probate were taken by an executor (d).

Will to be proved as though probate were taken.

Inasmuch as in many cases a grant *cum testamento annexo* is not within the stat. 21 Hen. VIII. c. 5, the Court in such cases can exercise its discretion as to whom the grant should be made, and the practice is to make the grant to the person having the greatest interest, in the absence of special circum-

Practice to make grant to person having the greatest interest.

(a) *Garrard v. Garrard*, (1871) L. R. 2 P. & D. 238.

(b) *Williams* (10th ed.) 227; and see *post*, p. 117.

(c) *Graysbrook v. Fox*, (1564) 1 Plowd. 279.

(d) See *Tr. & Co. P. P.* (14th ed.) p. 61.

Where several equally interested rules as in general grants apply.

Preference of residuary legatee.

Case of residuary bequest to a convent.

Residuary legatee being also next-of-kin.

stances (e). And where there are several equally interested the general rule is to make the grant to the nominee of the majority as in ordinary general grants (f), but any one may take without the consent of or notice to the others (g).

In practice the residuary legatee, even when there is no present prospect of any residue, is entitled to the grant in preference as well to the next-of-kin, as also to legatees and annuitants. He is entitled, though only residuary legatee in trust, but where the residuary legatee is a mere trustee, without any beneficial interest, it is the ordinary rule of practice, in the absence of special circumstances, upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate (h).

The residuary legatee, however, has no legal right to the grant under the statute, and therefore the Court may exercise its discretion (i).

In *In the Goods of McAuliffe* (k) a testatrix bequeathed the residue of her property to A. B. "to be disposed of as she shall think fit at her discretion for the benefit of" a Roman Catholic convent. The executor of the Will and A. B. having died during the lifetime of the testatrix, the Court made a grant of administration with the Will annexed to the reverend mother of the convent as residuary legatee, on proof of the permanence of the institution and of the fitness of the reverend mother, having regard to her powers, to receive and apply the legacy, on the ground that if the Court is satisfied that the fund will be safely applied it is a fair exercise of its discretion, and is justified in allowing it to be paid over without the necessity of an application to the Chancery Division for a scheme.

But where the same person is both next-of-kin and residuary legatee, neither law nor practice, in the absence

(e) Williams (10th ed.) 371; In the Goods of Homan, (1884) 9 P. D. 61.

(f) In the Goods of Stainton, (1871) L. R. 2 P. & D. 212; *ante*, p. 103.

(g) Tr. & Co. P. P. (14th ed.) p. 57.

(h) Williams (10th ed.) 372, 374.

(i) In the Goods of Ewing, (1881) 6 P. D. 19, 24.

(k) [1895] P. 290.

of special circumstances, will warrant a refusal to grant administration to him (l).

Before administration with the Will annexed is granted to a person in whose favour the disposition is made, it is the practice to cite the next-of-kin (m), and now since the Land Transfer Act, 1897, the heir-at-law also.

Citation before making grant.

Inasmuch as a residuary legatee and a residuary devisee are equally entitled to the grant, the one should be cleared off by citation before a grant is made to the other (n).

SECT. 2.—Administration *de bonis non*.

Upon the death of a sole administrator, or of the survivor of two administrators, in order to effect a representation to the intestate, the Court must appoint an administrator *de bonis non*; for on the death of the administrator no authority can be transmitted by him to his executor or administrator, but it results to the Court to appoint another officer (o).

Upon death of sole administrator or survivor of two administrators.

Where probate has been granted and the executor who has proved or, if more than one prove, the survivor dies without having fully administered, if owing to his intestacy or otherwise the representation is not transmitted to any executor of his, administration *de bonis non*, that is, of the goods of the original testator left unadministered, becomes necessary (p).

Upon death intestate, after probate, of sole executor or survivor of two executors.

If the executor having survived his testator should die before probate, but after having acted, the grant will be an immediate grant and not *de bonis non*, since although the acts of the deceased executor are good, the administering is an act *in pais*, of which the Spiritual Court could not take notice (q).

Effect of executor having acted and dying before probate.

Where the Will of the original testator is proved abroad and the executor dies without proving the Will here, his executor does not represent the original testator and administration here must be obtained (r).

(l) *Linthwaite v. Galloway*, (1757) 2 Lee, 414.

(m) *Williams* (10th ed.) 376.

(n) See *Tr. & Co. P. P.* (14th ed.) p. 58.

(o) *Williams* (10th ed.) 382.

(p) See *Williams* (10th ed.) 379 *et seq.*

(q) *Wankford v. Wankford*, (1698) 1 Salk. 299, 308; *Williams* (10th ed.) 379.

(r) *In the Goods of Gaynor*, (1869) L. R. 1 P. & D. 723.

The grant
should follow
the interest.

In the grant of administration, the principle that the grant ought to follow the interest applies equally to a *de bonis non* administration as to an original administration, where there are no special circumstances (s).

Limited Administrations.

Particular
time, or
specified sub-
ject matter.

Limited administrations may be restricted to a particular extent of time, or to a specified subject matter.

Consent,
renunciation
or citation of
person
entitled to
general grant.

By rule 29, P. R., 1862, "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge."

Person
entitled to
general grant
not allowed
limited grant
except by
direction of
judge.

By rule 30, "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the judge."

Renunciation
in one char-
acter pre-
cludes taking
grant in
another ;

By rule 50, "No person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character."

but rule cap-
able of modi-
fication.

This rule is capable of modification by the Court on sufficient reason being shown (t). But if the applicant is entitled to a general grant, the Court will not make a grant to him with the Will annexed limited to an appointed fund merely because he is apprehensive of being harassed with actions by creditors of the deceased (u).

SECT. 3.—*Administration durante minore ætate.*

Person
appointed
sole executor
or person
having right
to adminis-
tration being
under age.

When the person appointed sole executor under the Will, or the person to whom, in the case of an intestacy, the right to administration devolves is under age, administration *durante minore ætate* must be granted (x).

(s) Williams (10th ed.) 382 *et seq.*

(t) In the Goods of Loftus, (1864) 3 Sw. & Tr. 307 ; *ante*, p. 56.

(u) In the Goods of Somerset, (1867)

L. R. 1 P. & D. 350 ; and see *post*, p. 130.

(x) See Williams (10th ed.) 386 *et seq.*

Formerly an infant executor was considered capable of the office on attaining the age of seventeen years, but stat. 38 Geo. III. c. 87, s. 6, enacts, "That where an infant is sole executor, administration with the Will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the Will shall be granted to him."

If there are several executors and one is of full age and willing to execute the Will no administration of this kind ought to be granted, since there is no necessity for it (y).

Several executors and one of age willing to act.

But in the case of several next-of-kin in equal degree, entitled under an intestacy, if the interest of those under age preponderate, administration *durante minore etate* will be granted to the guardian (z).

Several next-of-kin and the interest of minors preponderate.

This sort of administration not being within the stat. 21 Hen. VIII. c. 5, it is discretionary in the Court to grant it to such person as it shall think fit. In the exercise of this discretion it is the practice of the Court to grant the administration to the guardian (a).

Grant discretionary in Court.
Practice to make grant to guardian.

With respect to the appointment of guardian there is a distinction betw. an infant, that is, a person under seven years of age, and a minor, that is, a person between the age of seven and twenty-one years. The Court *ex officio* assigns a guardian to an infant; the minor himself may nominate his guardian, who is then admitted in that character by the judge, but if the minor makes an improper choice the Court will control it (b).

As to appointment of guardian: distinction between infant and minor.

According to the practice the guardianship is granted to the next-of-kin of the child, unless sufficient objection to him is shown. The father of the infant has therefore the best right to be appointed, and is as a general rule preferred by the Court, and in the absence of reason to the contrary, the grant of administration for the use of the infant or minor is made to him.

Who will be appointed.

(y) Williams (10th ed.) 386.

(1884) 9 P. D. 66.

(z) *Ibid.*

(b) Williams (10th ed.) 388.

(a) *Ibid.*; In the Goods of Gardiner,

If the father is not living, the guardian, if any, appointed by the father's deed or Will, under 12 Car. II. c. 24, is preferred to a guardian elected by the child (c).

Effect of
Guardianship
of Infants
Act, 1886.

By s. 2 of The Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), on the death of the father of an infant, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians so appointed should be dead or refuse to act, the Court may appoint a guardian or guardians to act jointly with the mother.

By s. 8 (1) the mother of any infant may by deed or Will appoint a guardian or guardians after the death of herself and the father; and where guardians are appointed by both parents they shall act jointly.

By s. 4, every guardian under the Act is to have all the powers of a guardian appointed under the Act of 12 Car. II. c. 24.

It would seem that no election or assignment of the mother of the minor or infant as guardian to take or renounce a grant is necessary, but she is required to file a declaration (d).

Mode of
assigning
guardian.

By rule 84 of P. R., 1862, "In cases of infants (*i.e.*, under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or of one of the registrars; the registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next-of-kin of the infants, or that their next-of-kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship."

Where there
are both
minors and
infants.

By rule 85, "Where there are both minors and infants,

(c) Williams (10th ed.) 888; In the Goods of Morris, (1862) 2 Sw. & Tr. 360.

(d) Tr. & Co. P. P. (14th ed.) p. 103; and see P. R. 1862, r. 86.

the guardian elected by the minors may act for the infants without being specially assigned to them by order of the judge or a registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar."

If a wife be the only next-of-kin, and a minor, she may elect her husband her guardian to take the administration for her use and benefit during her minority (e). Wife being a minor.

It would seem to be the better opinion that if administration is committed during the minority of an executrix and she takes husband of full age the administration does not cease (f). Effect of marriage of female minor after grant.

If administration is granted during the minority of several infants it determines upon the coming of age of any one of them (g). Effect of coming of age of one of several minors.

If administration is granted during the minority of several infants one of whom dies before he comes of age, this will not determine the administration (h). Effect of death of one of several minors.

When the administration determines the administrator *durante minore ætate* may be called to account by the executor or by a subsequent administrator (i), but he could demur to an action brought against him without either the executor or administrator being made a party (k). Liability of administrator to account: to subsequent administrator;

It is said that if an administrator *durante minore ætate* be repealed, and another made administrator *durante minore ætate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release, shall not be any bar to it (l). to infant at full age.

While the minority lasts the administrator *durante minore ætate* has all the powers of an ordinary administrator (m). Powers of administrator.

(e) Williams (10th ed.) 388.

(f) Williams (10th ed.) 392.

(g) *Ibid.*

(h) *Ibid.*

(i) *Fotherby v. Pate*, (1747) 3 Atk. 603; *Taylor v. Newton*, (1752) 1 Lee, 15.

(k) *Fotherby v. Pate*, *ubi sup.*

(l) Williams (10th ed.) 396; but cf. *post*, p. 221.

(m) *Re Cope*, (1880) 16 C. D. 49; but see *Re Thompson and McWilliams' Contract*, [1896] 1 Ir. R. 356.

Adminis-
trator *d. m. o.*
of executor
of an executor
is representa-
tive of first
testator.

Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante minore etate* of the executor of an executor is *in loco executoris*, and the representative of the first testator (*n*).

SECT. 4.—Administration *durante absentia*.

Power of the
Ecclesiastical
Courts.

If the executor named in the Will, or the next-of-kin, be out of the kingdom, the Ecclesiastical Courts always had power, before probate obtained, or letters of administration issued, of granting to another a limited administration *durante absentia* (*o*). But when probate was once granted, and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorised to grant new administration on the ground that the executor had left the kingdom.

Effect of
38 Geo. III.
c. 87.

To remedy the consequent inconvenience, 38 Geo. III. c. 87, enacted that at the expiration of twelve months from the death of any testator (*p*), if the executors or executor to whom probate shall have been granted should reside out of the jurisdiction, the Court might, on the application of any creditor, next-of-kin, or legatee, grant special administration limited for the purpose of proceedings in equity and to carry the decrees of the Court into effect.

Effect of
Court of Pro-
bate Act,
1858.

By 21 & 22 Vict. c. 95, s. 18, the provisions of the Act of Geo. III. were extended to all executors or administrators residing out of the jurisdiction, whether it be or be not intended to institute proceedings in the Court of Chancery (*q*).

These sections apply to the case of an executor's executor (*r*).

Powers of ad-
ministrator.

During the continuance of the administration the administrator *durante absentia* has all the powers of an ordinary administrator, but since he cannot warrant to a purchaser that his principal is alive on his execution of a conveyance,

(*) Williams (10th ed.), 397.

(o) See In the Goods of Suarez, [1897] P. 82.

(p) These words mean at or after the expiration of the period: In the Goods of Ruddy, (1872) L. R. 2 P. & D.

330.

(q) See Williams (10th ed.) 403 *et seq.*

(r) In the Goods of Grant, (1876) 1 P. D. 435.

he cannot obtain a decree for specific performance against a purchaser of land (s).

Although in the Act 38 Geo. III. c. 87, reference is made to the application of any creditor, next-of-kin, or legatee, yet in *In the Goods of Collier* (t), the Court made a limited grant to the personal representative of a legatee; and in *In the Goods of Campion* (u), to the nominee of a limited company as assignee of the residuary legatee.

To whom grant may be made.

Where the applicant is residuary legatee, but it is uncertain whether there will be any residue, the grant will be made under 38 Geo. III. c. 87, to enable the applicant to become a party to Chancery proceedings, and not under s. 18 of 21 & 22 Vict. c. 95 (x).

When grant is still limited to proceedings in Chancery.

If, in the exercise of its ordinary jurisdiction, the Court granted administration simply during the absence of an executor, or next-of-kin, the authority of the administrator would be at an end the moment he returned (y), although payment to such administrator of a debt without notice of the executor's return might be a good payment (z); but the form of the grant is now "and until the executor (or the party entitled to the administration) should duly apply for and obtain probate (or administration)" (a). Where the administration is for a limited purpose under the Act 38 Geo. III. c. 87, as long as any of the purposes of the decree in equity are to be carried into effect, and until the executor is substituted, the administration is kept on foot, and on the executor being substituted the administrator may require the accounts of his administration to be taken and his costs provided for and be discharged (b). Under P. R., 1862, r. 75, no person can sue or act as executor until the administration is recalled or revoked.

When grant complete.

(s) *Webb v. Kirby*, (1857) 3 Sm. & G. 333, and on app. 7 De G. M. & G. 376, and cf. *Re Cope*, (1880) 16 C. D. 49.

(t) (1862) 3 Sw. & Tr. 444.

(u) [1900] P. 13.

(x) *In the Goods of Ruddy*, (1872) L. R. 2 P. & D. 330.

(y) *Taynton v. Hannay*, (1802) 3 Bos. r. Pull. 26; see also S. C. 7 Ves. 460.

(z) *Clave v. Hedges*, cited from MS. in *Walker v. Woolaston*, (1731) 2 P. Wms. 579.

(a) See *In the Goods of Cassidy*, (1832) 4 Hagg. 360.

(b) *Taynton v. Hannay*, *ubi sup.*

Grant to
attorney of
absent
executor.

When the executor resides out of the jurisdiction administration *cum testamento annexo* may be granted to another person under a letter of attorney from the executor for his use and benefit (c). A power of attorney in general terms executed by the executor on going abroad before the death of the testator may be sufficient (d). The letter of attorney is revocable; and when the executor revokes it and desires probate, the Court is bound to grant it to him (e). And on the death of the executor the letters of administration cease to be of any force (f).

Grant to
attorney of
executor con-
tinues chain
of representa-
tion.

A grant to an attorney of an executor does not break the chain of representation, as a Will proved by an attorney of an executor is the same thing as if actually proved by the executor himself (g).

Sect. 5.—Administration pendente lite.

Effect of
Court of Pro-
bate Act,
1857.

The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 70, enacts that "pending any suit touching the validity of the Will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction."

Rights and
powers of
adminis-
trator.

The Court has no power to order debts to be paid, but it has power under this section to appoint an administrator pending litigation who can pay them (h).

(c) Williams (10th ed.) 377; In the Goods of Barker, [1891] P. 251; and see Tr. & Co. P. P. (14th ed.) p. 99 *et seq.*; and see *ante*, p. 105, as to grant of administration to attorney of next-of-kin.

(d) In the Goods of Barker, *ubi sup.*

(e) Pipon v. Wallis, (1758) 1 Lee 402.

(f) Webb v. Kirby, (1837) 7 De G. M. & G. 376.

(g) In the Goods of Bayard, (1849) 1 Robert. 768; In the Goods of Murguia, (1884) 9 P. D. 236.

(h) See per *Ld. Pensance* in Tichborne v. Tichborne, (1869) L. R. 1 P. & D. 780.

If an order for administration is made by the Chancery Division, the Probate Division will not exercise its power under s. 70 to control and make orders upon the administrator *pendente lite*, but will leave the administrator to act under the orders of the Court in the administration action (i).

Sect. 71 provides that "it shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid, or any other person, to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any Will of such deceased person by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate as the Court may direct" (k).

Power to appoint administrator receiver of rents of real estate with power to let and manage.

By stat. 21 & 22 Vict. c. 95, s. 22, "all the provisions contained in the Court of Probate Act, respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act" (l).

Duration of office.

The duties of an administrator and receiver *pendente lite* commence from the order of appointment, and, if the decree pronouncing against the Will is appealed from the appeal operates as an extension of the suit, and his duties do not cease until the appeal has been disposed of (m). The functions of an administrator *pendente lite* terminate with a decree pronouncing in favour of a Will with executors, and do not continue until the executors obtain probate; and it would seem the case is not altered if there are no executors, since in that case the estate vests in the Court, subject to the right of the person entitled to administration to apply for it (n).

The Court will not appoint an administrator *pendente lite* unless satisfied of the necessity for the appointment, as where there is no one who is legally entitled to represent

Court must be satisfied of necessity of appointment.

(i) *Tichborne v. Tichborne*, (1870) L. R. 2 P. & D. 41.

(k) There is no jurisdiction under s. 71 where the litigation is as to the individual appointed executor and not as to the validity of the Will: *Grant*

v. Grant, (1869) L. R. 1 P. & D. 654.

(l) See *Wright v. Logers*, (1870) L. R. 2 P. & D. 179.

(m) *Taylor v. Taylor*, (1831) 6 P. D. 29.

(n) *Wieland v. Bird*, [1894] P. 262.

or to take possession of the deceased's property and it is requisite to bring actions, or make demands, or pay debts, but such an appointment will not be made merely to represent the interests of the deceased in a partnership business (o).

Application of person not a party to the suit.

The Court has power under s. 70 to appoint an administrator *pendente lite* in contested testamentary and administration suits on the application of a person who is not a party to such suit (p).

On appointment Chancery Division will discharge any order made appointing receiver.

On the appointment by the Probate Division of an administrator *pendente lite* the Chancery Division will discharge any order it may have made appointing a receiver and will allow the administrator to receive the estate, making such orders upon him as it may think proper (q).

When application to Chancery Division to appoint receiver can be made.

The Chancery Division will not appoint a receiver in administration proceedings to do that which the administrator *pendente lite* can do (r).

If there is a *lis pendens* in the Probate Division the proper course is to apply to that Court; but if there is no *lis pendens* in the Probate Division that Court has no jurisdiction to appoint a receiver and the application should be made to the Chancery Division, if the assets are in danger, pending probate or grant of letters of administration: but the proper person entitled to the grant should be before the Court on the application (s).

Under similar circumstances the Chancery Division will appoint a receiver *pendente lite* of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession (t).

Caveat proceedings, which terminate by appearance, do not constitute a *lis pendens* or furnish any mode of approaching the Probate Court (u).

(o) *Horrell v. Witta*, (1866) L. R. 1 P. & D. 103; and see *Tichborne v. Tichborne*, (1869) L. R. 1 P. & D. 730.

(p) *Tichborne v. Tichborne*, *ubi sup.*; *In the Goods of Evans*, (1890) 15 P. D. 215; *In the Estate of Cleaver*, [1905] P. 319.

(q) *Tichborne v. Tichborne*, *ubi sup.*

(r) *Veret v. Duprez*, (1868) L. R. 6 Eq. 329; *Hitchen v. Birks*, (1870) L. R. 10 Eq. 471.

(s) *Re Henderson*, (1885) 2 T. L. R. 322; *Re Parker*, (1885) 54 L. J. Ch. 694.

(t) *Parker v. Seddons*, (1870) L. R. 16 Eq. 34.

(u) *Salter v. Salter*, [1896] P. 291.

An application for the appointment of a receiver pending probate should not be made to the Chancery Division except there are special circumstances, such as danger to assets requiring the appointment (v).

Where an executor had before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Probate Court gave leave to the co-executor to issue a writ in the Probate Division against him, claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (x).

It is the practice of the Court to decline putting a litigant party in possession of the property, by granting administration pending suit to him; always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties (y). But where the plaintiffs in an action in the Probate Division had been appointed receivers in a creditor's action for administration in the Chancery Division the Court appointed them administrators *pendente lite* (z).

To whom administration *pendente lite* will be granted.

Under s. 72 of 20 & 21 Vict. c. 77, the Probate Division may allow to administrators and receivers appointed pending suits reasonable remuneration out of the personal and real estate of the deceased.

Allowance of remuneration.

SECT. 6.—Administration *ad colligenda bona*.

Such grants are usually made for the purpose of protecting the estate pending delay in making a general grant, and where the necessity of the case requires an immediate grant. The grant may be made to a stranger connected with the deceased's affairs (a).

Object of grant.

Before the Court of Probate Act, 1857, an administrator *ad colligenda bona* was practically in the position of a receiver merely. Now under s. 78 of that Act the Court has power to

Powers of administrator.

(v) *Re Parker, ubi sup.*

(x) *In the Goods of Moore*, (1888) 13 P. D. 36.

(y) *Williams* (10th ed.) 400.

(z) *In the Estate of Cleaver*, [1905] P. 319.

(a) See Tr. & Co. P. P. (14th ed.) p. 130, where instances of such grants are given, and *ibid.*, p. 858 where the general form of administration oath is given.

make a grant of partial administration to a temporary administrator, subject to such limits as the Court thinks fit to impose, and the Court may give him the full powers of an ordinary administrator during the time that he is to act as administrator. So that where such an administrator is empowered to sell a lease the lease thereby becomes vested in him, otherwise he would be unable to give effect to the sale; and should he enter into possession he is personally liable during the continuance of his possession for rent at the yearly value (b).

SECT. 7.—*Administration limited until original or authentic copy of Will be brought into the registry.*

Administration may be granted limited until the Will of the deceased, or an authentic copy thereof, should be transmitted to this country (c); or where the Will is alleged to have been accidentally destroyed or lost, and there is no evidence of its contents until the original Will or an authentic copy be brought into the registry (d); but such grants are generally *ad colligenda* to protect the estate, or limited to dealing with and completing the sale of specific property (e).

Under special circumstances the Court will grant probate of certain papers forming part of the Will of a deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers, or authentic copies thereof, when they arrive, and on an undertaking on his part that he will do so (f).

SECT. 8.—*Administration limited during incapacity through illness or lunacy.*

Executor incapacitated.

Where an executor is incapacitated through illness, the Court will grant administration with the Will annexed for the use and benefit of the executor till his recovery (g).

(b) *Whitehead v. Palmer*, [1908] 1 K. B. 151.

(c) *In the Goods of Metcalfe*, (1822) 1 Add. 343.

(d) *In the Goods of Wright*, [1893] P. 21.

(e) *Ibid.*; but see *In the Goods of*

Campbell, (1829) 2 Hagg. 555, where the grant was not so restricted.

(f) *In the Goods of Robarts*, (1873) L. R. 3 P. & D. 110.

(g) *In the Goods of Ponsonby*, [1895] P. 287; and see *post*, p. 138, as to incapacity after probate.

Where a sole executor becomes lunatic it is the ordinary practice of the Court to make a limited grant to his committee for his use and benefit during his lunacy (*k*), but with the consent of the committee a grant with the Will annexed may be made to a residuary legatee (*i*); but if there is no committee the only way of clearing off a lunatic executor is by citation (*k*).

Executor becoming lunatic.

The practice as to administration where a grant has been made to a single administrator as next-of-kin, and such next-of-kin becomes insane, is stated as follows by Sir F. H. Jeune in *In the Goods of Cooke* (*l*).

Administrator becoming lunatic.

"First, where such a lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic, so long as he shall remain a lunatic. The first grant is not, in such case, impounded.

1. Where committee has been appointed.

"Secondly, where the lunatic is not so found by inquisition, but, under s. 116 of the Act of 1890, a person has been appointed with general authority over the lunatic's property, such person has been, and it seems to me reasonably so, treated in the same way as if he were a committee of the lunatic's estate.

2. Where no committee, but person appointed under s. 116 of Lunacy Act, 1890, with general authority.

"Thirdly, if a person appointed under s. 116 has conferred upon him only specified powers falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to a grant.

3. Where such person has only specified powers.

"Fourthly, where there is no committee, and no person in the position of a committee, the practice has been to make a grant to another of the next-of-kin of the deceased for the use of the lunatic next-of-kin, so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant impounded."

4. Where there is no committee and no person in position of committee.

"Fifthly, it is not the practice to inquire whether the lunatic is likely to recover, and in the event of its appearing

No new grant though lunatic not likely to recover.

(*k*) In the Goods of Phillips, (1824) 2 Add. 336, n. (*b*).

(*k*) Tr. & Co. P. P. (14th ed) p. 203; and see *post*, p. 139.

(*i*) In the Goods of Milnes, (1826) 3 Add. 55.

(*l*) [1895] P. 68.

that he is not likely to recover, to revoke the old grant, and to make an absolute grant to the other next-of-kin."

One of joint administrators becoming lunatic.

In the case of a defect in legal representation occasioned by the lunacy of one of several administrators the joint administration should be brought into the registry and revoked and a special administration granted to the sane administrator (*m*).

SECT. 9.—*Administration limited to specific effects.*

Exceptional.

There may also be a grant of administration limited to certain specific effects of the deceased and the general administration may be committed to a different person. But grants of this nature are entirely exceptional, and should not be made unless a very strong reason is given (*n*).

To *cestui que trust* limited to trust fund, after death of trustee.

The Court will grant letters of administration to the *cestui que trust* of a trust fund, limited to that fund, after the death of the trustee, on the consent of his personal representatives (*o*).

To effects in a particular country or place.

An administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another (*p*). And where the deceased leaves a Will expressly limited to property abroad, which is proved by the executors in the foreign Court, but dies intestate as to property in this country, administration of the property in this country will be granted to the next-of-kin (*q*).

SECT. 10.—*Administration limited to specific acts.*

Revival of representation necessary for performance of a single act

It frequently happens that the representation is broken by the death of a sole executor intestate, and its revival is necessary merely for the performance of a single act. In such

(*m*) In the Goods of Newton, (1843) 3 Curt. 428; and see *post*, p. 138.

(*n*) In the Goods of Somerset, (1867) L. R. 1 P. & D. 350.

(*o*) Pegg v. Chamberlain, (1860) 1 Sw. & Tr. 527; In the Goods of

Ratcliffe, [1899] P. 110; In the Goods of Butler, [1898] P. 9.

(*p*) Williams (10th ed.) 419.

(*q*) In the Goods of Mann, [1891] P. 293.

cases, administration with the Will annexed will be granted limited to that particular object. For instance, when the representatives of a trustee, in whom a term of years or charge was vested, are dead, a limited administration to another trustee for the purpose of making an assignment will be granted(r).

Administration may be granted limited to commencing or substantiating proceedings in Chancery, but such an appointment is in many cases rendered unnecessary by R. S. C., Ord. XVI. r. 46, which enables the Court to proceed in the absence of any person representing the estate of the deceased or to appoint some person to represent his estate for all the purposes of the proceeding. Although, generally, this rule will not be applied where the estate of the deceased is that which is being administered, or against which relief is sought in the action, yet the Court has a discretion; and where, owing to the great lapse of time since a fund was paid into Court by executors, every endeavour to trace the representatives of the testator had failed, the Court directed inquiries as to the persons legally and beneficially entitled to the fund without the suit being revived(s). The Court will not grant a general administration where an administration *ad litem* is sufficient, as where the purpose is limited(t). But a limited administration is not sufficient in a case which, from its nature and character, according to the practice of the Court, involves general inquiries as to next-of-kin, or general inquiries as to assets and creditors(u).

Or to commence or substantiate proceedings in Chancery.

(r) Williams (10th ed.) 413; In the Goods of Butler, [1898] P. 9.
(s) Ballard v. Milner, (1895) W. N. p. 14.

(t) Williams (10th ed.) 416.
(u) Dowdeswell v. Dowdeswell, (1898) 9 C. D. 294.

CANADIAN NOTES.

Authority
limited.

An administrator *cum testamento annexo* has no authority as such to compromise dower or other claims by assigning to the claimant a portion of the real estate of the deceased. *Irwin v. Toronto General Trusts Co.* (1897), 24 A.R. 484.

Where an administrator *cum testamento annexo* died without having filed any accounts of his administration, it was held that the Judge of Probate was right in refusing to pass accounts filed by the executors of the deceased administrator, of his administration, until an administrator *de bonis non* of the original testator's estate was appointed. *Ex parte Frost* (1866), 11 N.B.R. 482.

Property
omitted
from
inventory.

On the settlement of the estate of C., it was found that a large sum was due to D. the surviving administrator, but that there were no assets out of which the same could be paid. An application was made to the Court of Probate by the acting administrator of the estate of D. for administration *de bonis non* of the estate of C., alleging that at the time of his death C. was interested in certain property, which escaped the notice of his administrators, and had not been included in the inventory of his estate. Petitioner was granted administration and, on appeal to the Supreme Court of Nova Scotia, the judgment of the Probate Court was confirmed, and it was held that the Court could not deal with the questions whether the right of C. to the property had been lost by adverse possession or whether the petitioner's right of action was barred by the Statute of Limitations. *Re Estate of Cunningham* (1896), 31 N.S.R. 264.

Charging
interest.

An administrator *de bonis non* having obtained a decree against the representatives of a deceased administrator for an account of his dealings with estate: Held, that he was entitled to charge the representatives with interest, etc., in the same manner, and to the same extent, as one of the next of kin might have done. *McLennan v. Howard* (1862), 9 Gr. 178.

As to whether an administrator *de bonis non* can call in question the administration of his predecessor in office,—See *Tiffany v. Thompson* (1862), 9 Gr. 244. See, as to action by administrator *de bonis non*, to enforce a covenant for payment of a legacy. *Mowbray v. Fletcher* (1908), 11 O.W.R. 937.

If an administrator, on competent advice, pays a claim *bona fide* made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back. *Mayhew v. Stone* (1895), 26 S.C.R. 58.

Where the only living issue and heir at law of an intestate brought an action to set aside on the ground of undue influence a transfer of property made by the intestate to the defendant and applied for an order under Rule 194 or 195 appointing him administrator or administrator *ad litem* of the deceased, it was held that the order could not be made under Rule 194 for the reasons given in *Hughes v. Hughes*, 6 A.R. 373, 380, nor under Rule 195, which was not applicable to a case of a plaintiff who without right or title has commenced an action and then seeks to legalize his illegal act by an order of the Court. *Fairfield v. Ross* (1902), 4 O.L.R. 534.

Administra-
tor
ad litem.

Where the plaintiff was appointed under Rule 311, administrator *ad litem* of a deceased person's estate in a summary administration matter more than twelve months after the death, it was held that he had no *locus standi* to maintain an action to set aside a tax sale of land belonging at the time of death to the estate of the deceased. *Rodger v. Moran* (1896), 28 O.R. 275.

When a suit is pending in the Court of King's Bench to set aside a will, that Court has exclusive power under section 23 of the King's Bench Act and sections 18 and 39 of the Surrogate Courts Act, R.S.M., 1902, c. 41, to appoint an administrator *pendente lite*, and such power may, under Rule

449 of the King's Bench Act, be exercised by a Judge in Chambers. Notwithstanding the generality of the language used in Rule 27 of the King's Bench Act the Referee in Chambers has no jurisdiction to make such an appointment. *Tellier v. Schliemans* (1907), 16 Man. R. 430.

Compensation
to executors.

A testatrix by her will, after the bequest of certain legacies, directed that the residue of her estate should be divided into four equal shares, three of which she directly disposed of and the fourth share she devised to her son, not to be payable to him until ten years after her death, and in the meantime he was to be entitled to the income. The son died shortly after his mother having made a will and appointed executors. On his death an order was made directing the administrators with the will annexed of the testator's estate to pass their accounts relative to the son's share, and to hand it over to his executors. On a question being raised as to the compensation payable to such administrators it was held that such compensation should be paid out of the son's estate and not that of the testatrix. *Re Church Estate* (1906), 12 O.L.R. 18.

Discretion
of Judge
of Probate.

The granting of administration *de bonis non* to the widow of the deceased was appealed from by his daughter on the ground that the administratrix had been guilty of waste on the lands set off to her as dower. It appeared that, whether her acts amounted to waste or not, she considered herself justified in the course she had pursued. It was held that as there was nothing to indicate such dishonesty on the part of the widow as should preclude her from all right to the administration, the Court could not control the discretion conferred by the Act on the Judge of Probate. *In Estate of James W. Roop*, R.E.D. 162.

Adminis-
trator
pendente
lite.

Where there is a person clothed with a right to the custody and control of the estate, an appointment of administrator *pendente lite* will not be made unless a case of necessity owing to the estate being in jeopardy is shewn. *Tellier v. Schliemann* (1907), 5 W.L.R. 467.

The only authority to appoint an administrator *pendente lite* in the application to remove a case into the High Court

is that conferred upon the Court by the Surrogate Courts Act, and section 56 of that Act gives jurisdiction to the High Court, where an action is pending in it touching the validity of the will of a deceased person, to appoint such an administrator. *Beaty v. Haldan*, 4 App. R. 239. But such an order should not be made until the case has been removed into the High Court. *Re Gooderham* (1906), 8 O.W.R. 685.

As to the appointment of an administrator *pendente lite*, see also *Peterkin v. McFarlane*, 6 A.R. 254, and *Wilson v. Beatty*, 9 A.R. 149. As to the form of order for administration *ad litem*, see *Cameron v. Phillips*, 13 P.R. 141.

R.S.O. 1897, c. 129, s. 11, providing that a person wronged in respect to his person or property by one, since deceased, may maintain an action against the administrators or executors of the latter, does not authorize such an action against an administrator *ad litem* merely, but only against an executor or general administrator, clothed with full power to collect the assets, pay the debts and divide the estate which he represents. For this reason, apart from others, the appointment of an administrator *ad litem* should be refused in an action brought against five persons for malicious prosecution, one of whom had died after issue joined but before trial, and whose widow and children refused to administer to the estate. *Hunter v. Boyd* (1901), 3 O.L.R. 183.

In Ontario it is enacted that a person entitled to take out letters of administration to the estate of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased exclusive of the real estate, R.S.O., c. 59, s. 61.

Limited
administra-
tion.

"Administration" shall include all letters of administration of the effects of deceased persons whether with or without the will annexed, and whether granted for general, special or limited purposes.

CHAPTER VIII.

OF THE SECURITY REQUIRED OF AN ADMINISTRATOR.

21 Hen. VIII.
c. 5, s. 3.

STAT. 21 Hen. VIII. c. 5, s. 3, directed the Ordinary to grant administration "taking surety of him or them to whom shall be made such commission for the true administration of the goods, chattels, and debts which he or they shall be so authorized to minister."

22 & 23 Car.
II. c. 10, s. 1.

Stat. 22 & 23 Car. II. c. 10, s. 1, provides that all Ordinaries and judges having power to commit administration shall upon committing administration take sufficient bonds with two or more able sureties, respect being had to the value of the estate, and the form of bond is given in the Act.

20 & 21 Vict.
c. 77.

Bond now
given to the
judge;

with one or
more sureties
if required.

Treasury soli-
citor or soli-
citor of Duchy
of Lancaster
excepted.

Penalty of
bond.

These provisions as to the surety bond or other security to be taken were repealed by s. 80 of the Court of Probate Act, 1857; and s. 81 of the same Act provides that "every person to whom any grant of administration shall be committed shall give bond to the Judge of the Court of Probate to enure for the benefit of the Judge for the time being, and, if the Court of Probate or (in the case of a grant from a district registrar) the district registrar, shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; provided, that it shall not be necessary for the solicitor for the affairs of the Treasury or the solicitor of the Duchy of Lancaster applying for or obtaining administration to the use and benefit of her Majesty to give any such bond as aforesaid."

By s. 82, "Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the case may be, shall in any case think fit to direct the same

to be reduced, in which case it shall be lawful for the Court or district registrar so to do; and the Court or district registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable" (a).

Where an estate has been partly administered and a further bond becomes necessary, the Court will allow the administrator to take the grant for the amount then due to the estate, on giving a bond with two sureties for double that amount (b).

After part administration.

By s. 83, "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond."

Mode of enforcing bond.

The bond is conditioned upon the doing of four things: first, to make a true and perfect inventory of the personal estate and effects of the deceased; second, to administer the estate; third, to make an account of the administration if required; and fourth, to pay the residue to the persons entitled to it (c).

Condition of bond.

When the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate, that is such a breach of the condition of the bond by which the administrator undertakes "well and truly to administer according to law," as will entitle the next-of-kin to have the bond put in suit at their instance (d).

What amounts to breach.

(a) For cases on these sections see Williams (10th ed.) 423 *et seq.*, and Tr. & Co. P. P. (14th ed.) pp. 87 *et seq.*

(b) In the Goods of Halliwell, (1885) 10 P. D. 198; In the Goods

of Oakley, [1896] P. 7.

(c) Dobbs v. Brain, [1892] 2 Q. B. 207, 213.

(d) Arch. of Canterbury v. Robertson, (1833) 1 Cr. & M. 690.

So also it is a breach of the condition of the bond to pay out of the estate to another person, by whom it is lost, a sum of money to meet a legacy given to a minor, there being no other residue undistributed to meet the legacy (e).

But where an undischarged bankrupt died leaving property acquired after the bankruptcy and his administrator without notice of the bankruptcy distributed the property among the bankrupt's next-of-kin before the trustee in bankruptcy intervened, it was held that the administrator was protected by the administration bond, but that the next-of-kin must refund (f).

Court may dispense with sureties but not with bond.

Under s. 81, the Court has power to dispense with sureties altogether, but the Court has no power to dispense with the bond (g).

Applications to dispense with sureties are discouraged (h) unless the person applying for administration is a public official or a nominee of a government department; for instance, the official receiver in bankruptcy (i), or the nominee of the Board of Education (k).

Sureties will not be dispensed with by reason of the property being large and the risk small, but the security may be made up of any number of bonds (l); and the Court will limit the bond in some cases (m). Nor will sureties be dispensed with although the estate is being administered by the Chancery Division and a receiver has been appointed (n).

Guarantee Society as surety.

The Court will accept a guarantee society as surety to a bond even though the directors do not by the bond render themselves personally liable (o).

Justifying sureties.

Justifying sureties to the administration bond are called

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|---|--|
| (e) <i>Dobbs v. Brain</i> , <i>ubi sup.</i> | (l) <i>In the Goods of Earle</i> , (1885) 10 P. D. 196. |
| (f) <i>Re Bennett</i> , [1907] 1 K. B. 149. | (m) <i>In the Goods of Paxton</i> , (1889) 14 P. D. 40; <i>In the Goods of Cormack</i> , [1891] P. 151; <i>Askew v. Askew</i> , [1891] P. 174. |
| (g) <i>In the Goods of Powis</i> , (1864) 34 L. J. P. M. & A. 55. | (n) <i>Jackson v. Jackson</i> , (1865) L. R. 1 P. & D. 12. |
| (h) <i>In the Goods of McGowan</i> , (1885) 10 P. D. 197. | (o) <i>Carpenter v. Queen's Proctor</i> , (1882) 7 P. D. 233. |
| (i) <i>In the Estate of Causton</i> , [1906] P. 124. | |
| (k) <i>In the Estate of Bryan</i> , [1905] P. 88. | |

for at the Court's discretion according to the circumstances of each case (*p*); but the Registry Rules provide that "when any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify" (*q*).

The Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them, since substituted sureties would not be and could not be made responsible for any past transaction of which they might know nothing (*r*).

Sureties cannot be substituted.

P. R., 1862, r. 88, provides that "Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix."

Attestation of bond.

By r. 40, "The administration bond is, in all cases of limited or special administrations, to be prepared in the registry."

Preparation of bond.

By the Probate Directions of May 10, 1893 (*s*): "1. The administrator of a foreign subject resident abroad may (*a*) if it shall be proved by affidavit that the deceased left no

Foreign sureties when allowed.

(*p*) Williams (10th ed.) 427. For instances where the Court has directed justifying security to be given, see Tr. & Co. P. P. (14th ed.) p. 85.

(*q*) P. R., 1862, r. 42; D. R., r. 49. For the form of affidavit to be filed in

such cases, see Tr. & Co. P. P. (14th ed.) p. 772.

(*r*) In the Goods of Stark, (1886) L. R. 1 P. & D. 76.

(*s*) See In the Goods of Scott, [1895] P. 342, n.

debts in England, (b) by leave of a judge at Chambers, be allowed to give a bond with foreign sureties" (t).

"2. In all other cases sureties residing in the United Kingdom, the Channel Islands, or the Isle of Man, shall be required, except by leave of a judge at Chambers" (u).

(t) As instances where such leave was given, see *In the Goods of Fernandes*, (1879) 4 P. D. 229; *In the Goods of De Beaufort*, [1893] P. 231.

sup., where leave was granted, deceased having left debts in England, but widow was unable to procure sureties in England.

(u) See *In the Goods of Scott*, *ubi*

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Where defendant applied for and obtained administration of his father's estate upon giving the statutory bond (R.S. 1900, c. 152 p. 25) to administer according to law, and subsequently applied to the Court of Probate for the settlement and distribution of the estate and obtained a decree for payment of the balance of the estate to himself as next of kin, without disclosing the fact that the estate was indebted to the estate of C., of which he and his father were executors and trustees, for moneys of that estate received and not accounted for it was held that there had been a breach of the condition for which the sureties were liable in an action on the bond. *Colford v. Compton* (1906), 39 N.S.R. 247.

Breach of condition.

The non-payment of a debt does not *per se* constitute a breach of an administration bond "well and truly to administer according to law" the goods and chattels of the intestate. *Sherlock v. McGee* (1848), 6 N.B.R. 116.

In an action on an administration bond to recover an amount decreed by the Judge of Probate to be divisible among the next of kin, the defence was that the decree was without jurisdiction, the husband of the administratrix not having been cited, and there being another citation outstanding, and that the decree was bad in having awarded costs against the administratrix without ten days' notice, as required by statute, before the issuing of the citation. It was held that the objection to the decree could only be taken in the Court below, and not by way of defence to an action on the bond. It was also held, as to a point not taken at the argument, that the decree was too vague to furnish the basis of an action on the

Decree too vague.

bond as it did not clearly decree to be divisible, the sum for the non-payment of which the action was brought. *Cowling v. Gates* (1888), 21 N.S.R. 78.

**Defalcation
of principal.**

The executors of sureties are liable for the defalcation of the principal committed after the death of their testator, and, even after notice given by the executors that they would not be liable. *The Queen v. Leeming et al.* (1850), 7 U.C.R. 306.

CHAPTER IX:

OF REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

THE Probate Division has jurisdiction to revoke its own Jurisdiction. grant of probate or letters of administration which has been improperly obtained either fraudulently or by false suggestion, or *per incuriam*, or which owing to circumstances has become ineffectual for the administration of the estate of the deceased; and applications for revocation will not be entertained by any other Division of the High Court (a).

Where probate or letters of administration have been Procedure by consent. improperly granted, the registrar may by consent, on the voluntary application of the parties supported by affidavit, make an order revoking the grant (b).

Unless the parties interested consent to a registrar's order Without consent :
Non-contentious business. for revocation, in non-contentious business the application for revocation must be made to the Court on motion (c).

An action for revocation of probate is instituted when it is desired to obtain an order on the alleged invalidity of the Will, or on some material informality in obtaining the probate. So also an action for revocation of letters of administration should be instituted where the object of the suit is to compel the party who has obtained the grant to establish his relationship entitling him to the grant. In either case the plaintiff must call in the probate or letters of administration by a citation which must either precede or must issue simultaneously with the writ (d). Contentious business.

Probate granted in common form will be revoked if after After probate in common form :
how next-of-kin should proceed :

(a) *Re Ivory*, (1878) 10 C. D. 372; and see *ante*, p. 89. As to the statutory jurisdiction of the Probate Division, see *ante*, pp. 66, 95.

(b) See *Tr. & Co. P. P.* (14th ed.) p. 185.

(c) *Ibid.*, p. 283.

(d) *Ibid.*, 317; and see *ante*, p. 110.

citation by the next-of-kin to prove *per testes* the executor is unable to prove the Will (e).

how executor
who has
proved should
proceed.

An executor who has proved a Will in common form cannot afterwards as such executor take proceedings for the purpose of having that probate revoked. If the validity of the Will is subsequently called in question he has no right to cite the persons interested under it, to propound it in solemn form, or to show cause why the probate in common form should not be revoked, but he should propound the Will and cite the parties interested in an intestacy to oppose it and give notice to the legatees that it is to be opposed, and that he does not intend to take steps to support it unless they guarantee his costs (f). The executor of an executor is in the same position in this respect as the original executor (g).

Probate
obtained by
fraud.

Where probate in common form has been granted by consent, it cannot afterwards be revoked on proof that the conditions on which it was granted have not been complied with, unless fraud or circumvention practised either upon the Court or the parties is clearly proved in procuring it (h).

After probate
in solemn
form.

Although a Will has been proved in solemn form, if fraud be shown, or if a later distinct Will be set up, parties having an interest may take proceedings to obtain revocation of probate (i).

False sug-
gestion by
minor.

Probate granted to a minor on the tacit or false suggestion that he is of full age will be revoked (k).

One of several
executors
becoming of
unsound
mind.

Where one of several executors who has proved a Will subsequently becomes of unsound mind, the Court, on the application of the others, will revoke the grant and make a fresh grant of probate to the applicants, reserving power to the lunatic, in case he should become of sound mind and apply, to join in the probate (l).

One of several
administra-
tors becoming
of unsound
mind.

So also where one of several administrators becomes of

(e) See *ante*, p. 73, as to proof in solemn form.

(f) In the Goods of Benbow, (1862) 2 Sw. & Tr. 488; In the Goods of Chamberlain, (1867) L. R. 1 P. & D. 316.

(g) *Ibid*.

(h) Nicol v. Askew, (1837) 2 Moore, P. C. C. 88.

(i) Williams (10th ed.) 451.

(k) Tr. & Co. P. P. (14th ed.) p. 177.

(l) In the Estate of George Shaw, [1905] P. 92.

unsound mind the grant is revoked and a new grant made to the same administrators alone (*m*).

Where a sole executor or administrator becomes of unsound mind after taking the grant, a temporary administration will be granted during the incapacity of the personal representative without revoking the former grant (*n*).

Sole executor or administrator becoming of unsound mind.

By 20 & 21 Vict. c. 77, s. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

Until administration recalled or revoked no person can act as executor.

Since the stat. 21 Hen. VIII. c. 5, administration cannot be repealed unless for a just cause (*o*).

Administration not recalled except for just cause.

The following are instances of sufficient ground for revocation of the grant: where it was granted within the 14 days (*p*) or without citing the necessary parties, or to other than the next-of-kin, or to illegitimate relatives, or to a woman who was not legally married to the deceased, or to the estate of a person still living as if dead, or to a wrong person having regard to the subsequent judicial construction of the Will, or to an elected guardian where it subsequently appears there is a testamentary guardian who had not renounced (*q*).

Instances of administration improperly granted.

If an administration has been properly granted even though the administrator has not intermeddled it cannot be revoked unless some strong ground be shown; a mere suggestion that it would be for the benefit of the estate is insufficient (*r*).

After administration properly granted.

The Court will however sometimes revoke an administration limited to particular property, and make a fresh grant to the assignee of the property, as where the administration was limited to a particular property of which the administrator was tenant for life, and he assigned his interest to his son, and asked that the grant might be revoked and a fresh grant made

Distinction between administration limited to particular property and general grant.

(*m*) In the Goods of Newton, (1843) 5 Curt. 428; see *ante*, p. 130.

(*n*) Tr. & Co. P. P. (14th ed.) p. 279; and see *ante*, p. 129.

(*o*) Williams (10th ed.) 452.

(*p*) See *ante*, p. 111.

(*q*) See Williams (10th ed.) 453 *et seq.*

(*r*) In the Goods of Heslop, (1846) 1 Robert. 457; Williams (10th ed.) 457.

to his son limited to that particular property (s). But where there had been a general grant with the Will annexed to a woman who intermeddled with the estate and subsequently married, and being deserted by her husband, who could not be found, was unable to make a title to certain leasehold property, the Court of Appeal refused to revoke the grant, either as to the general estate or as to the particular part which she wished to sell, on the ground that it would be a dangerous practice to make such an order and without any precedent for it (t).

Administra-
tion granted
to creditor
may be
revoked.

A creditor, except by the practice of the Court, has no right to administration (u), so that where the grant had been made to a creditor who, having been paid his debt, was desirous *bonâ fide* of retiring from the administration of the estate, the Court revoked the grant and made a new grant *de bonis non* to a child of the deceased (x).

Where admi-
nistrator has
absconded or
cannot be
found.

The Court will also revoke a grant which though lawfully made has subsequently become useless, and if allowed to subsist would prevent the administration of the estate (y). So that where the grant had been made to a creditor who, after his debt had been fully satisfied, absconded and could not be found, the Court revoked the grant, without citing him, and made a new grant to the sole next-of-kin of the deceased (z). The same principle has been applied where a grant had been made to one of the residuary legatees who having partly administered left his home and could not be traced; the Court revoked the grant and made a fresh grant to another of the residuary legatees (a).

Where admi-
nistrator is
out of juris-
diction.

Where however it can be shown that the administrator is residing out of the jurisdiction, administration limited to any property left unadministered may now be granted under s. 18 of the Court of Probate Act, 1858 (b).

(s) In the Goods of Ferrier, (1828) 1 Hagg. 241.

(t) In the Goods of Reid, (1886) 11 P. D. 70.

(u) *Menzies v. Fulbrook*, (1841) 2 Curt. 845, 850; and see *ante*, p. 105.

(x) In the Goods of Hoare, (1833) 2 Sw. & Tr. 361, n.

(y) Tr. & Co. P. P. (14th ed.) p. 176.

(z) In the Goods of Bradshaw, (1887) 13 P. D. 18.

(a) In the Goods of Covell, (1889) 15 P. D. 8.

(b) See *ante*, p. 122.

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No jurisdiction exists in the High Court of Justice nor has any been conferred upon it to revoke the grant by a Surrogate Court of letters of administration except under the authority of the Ontario Statute of 1896. *McPherson v. Irvine* (1895), 26 O.R. 438, following *In re Ivory, Hawkin v. Turner*, cited *ante*, at p. 137.

Jurisdiction to revoke.

Jurisdiction and authority to revoke probate of wills and letters of administration are conferred on the Surrogate Courts of Ontario by R.S.O. 1897, c. 59, s. 17. Jurisdiction to remove an executor is conferred upon the High Court in Ontario by section 39 of the Judicature Act.

To remove executor.

Where a person possessed of real and personal estate dies leaving no known relatives within the province, the Attorney-General on behalf of the Sovereign may maintain an action to set aside letters of probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding. Such an action under R.S.O., c. 59, is not for the purpose of escheating but to protect the property for the benefit of those who may be entitled. *Regina v. Bonnar* (1897), 24 A.R. 220.

Action by Atty.-Genl.

There have been conflicting views expressed in respect to the jurisdiction to remove an executor or administrator. In Ontario, by statute, the Surrogate Court by which the grant of probate or letters of administration was made is given, where the entire estate does not exceed \$1,000, the like authority for the removal of an executor or administrator as is by section 39 of the Ontario Judicature Act conferred upon the High Court, which Court by said section has authority to remove an executor or administrator upon the same grounds as it may remove any other trustee. By the same section

Removal of executor.

the Court is empowered to appoint any other person to act in the place of the executor or administrator so removed. Ont. Acts 1896, c. 20.

Moneys paid
before will
was set aside.

Defendant was appointed executor under a will which, after he had obtained probate and had collected debts, paid legacies, etc., was set aside for want of due execution. It was held that the granting of probate was a sufficient defence to an action brought by the administrators to recover the moneys paid. Also, that plaintiff's case was not strengthened by the fact that defendant, before paying the legacies had notice that the will would be attacked on another ground than that upon which it had been set aside. *Randall v. Delap* (1885), 18 N.S.R. 106.

In Ontario, by R.S.O. 1897, c. 59, s. 40, it is provided that no grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the particular county at the time of his death or had not property therein at the time of his death.

Removal of
executor.

An executor cannot be removed from his position where anything remains to be done pertaining to his office, even although the will provides for his continuance as a trustee thereunder after his duties as executor have ceased, and he had acted as trustee by investing part of the trust moneys. *Re Bush* (1890), 19 O.R. 1.

In the foregoing case, the decision in *In re Moore, McAlpine and Moore*, 21 Ch.D. 778, is referred to, and distinguished, inasmuch as in that case the executrix herself joined in the application to be retired.

CHAPTER X.

OF THE EFFECT OF REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

THE effect of revocation of a grant of probate or letters of administration mainly depends upon whether the grant was void *ab initio* or merely voidable.

In *Abram v. Cunningham* (a) it was decided that where administration is granted on concealment of a Will which appointed executors, the grant is void from its commencement, and all acts performed by the administrator in that character are equally void and cannot be made good though the executor should afterwards appear and renounce. But in *Peckham's case* (b) it was held that if the administrator had paid funeral expenses, debts, or legacies which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, forasmuch as he himself would have been bound to pay it. And it would seem from a statement in *Graysbrook v. Fox* (c) that in an action by the true executor against the vendee of goods sold to him by the administrator, the sale is indefensible if made to discharge the funeral expenses or debts which the administrator or executor was compellable to pay. Where, however, the act in question is one which the administrator was not compellable to do, but is a voluntary act on his part, it is simply void, and no title is thereby conferred on a vendee (d) or mortgagee (e) from him, and the vendor is also liable in damages in an action by the true executor (f).

Where the Will does not appoint executors the repealed

(a) (1677) 2 Lev. 182.

(b) (1488) cited in Plowd. 282;
Williams (10th ed.) 465.

(c) (1562) 1 Plowd. 275.

(d) *Graysbrook v. Fox. ubi sup.*

(e) *Ellis v. Ellis*, [1905] 1 Ch. 613.

(f) *Woolley v. Clark*, (1822) 5 B. &
Ald. 744.

Where grant
of adminis-
tration was
void *ab initio*:
on conceal-
ment of Will
appointing
executors;

on conceal-
ment of Will
not appoint-
ing executors.

grant obtained by suppressing the Will is not void *ab initio*, and therefore a sale of leaseholds under it was held to be a valid transaction (g).

Where grant of administration was voidable only.

And wherever the grant of administration is voidable only, as where it has been granted to a party not next-of-kin, or where the executor having acted, and the Court not knowing it committed administration to another, or without citing the necessary parties, all lawful acts done by the first administrator are valid as against the subsequent administrator, although if by covin they may be void by the stat. 18 Eliz. c. 5 against a creditor (h).

Pending appeal resulting in reversal of sentence.

Pending an appeal resulting in a reversal of a former sentence, all intermediate acts of the executor or administrator are ineffectual, because the appeal suspends the former sentence and on its reversal it is as if it had never existed (i). In such cases, therefore, it is expedient that an administrator *pendente lite* should be appointed under s. 70 of the Court of Probate Act, 1857 (k).

Administration granted on condition.

If the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good; so that the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional administrator (l).

Effect of 20 & 21 Vict. c. 77: as to *bonâ fide* payments made to or by executor or administrator before revocation;

By s. 77 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted that "where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same, and the executor or administrator, who shall have acted under any such revoked probate or administration, may retain, and re-imburse himself in respect of, any payments made by him, which the person, to whom probate or administration shall be afterwards granted, might have lawfully made."

(g) Boxall v. Boxall, (1884) 27 C. D. 220.

(h) Williams (10th ed.) 463; Boxall v. Boxall, *ubi sup.*, at p. 224.

(i) *Ibid.*

(k) See *ante*, p. 124.

(l) Williams (10th ed.) 463.

And by s. 78 it is enacted that "all persons and corporations, making, or permitting to be made, any payment or transfer *bond fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

and indemnity to persons and corporations making *bond fide* payments or transfers.

CHAPTER XI.

OF FOREIGN DOMICIL AND FOREIGN ASSETS.

SECT. 1.—Of the nature and acquisition of domicile.

Difference
between
nationality
and domicile.

NATIONALITY and domicile are quite distinct matters. Natural allegiance fixes the political status of the individual, and *exuere patriam* or change of allegiance may be beyond his power. The law of domicile determines his civil status and may be changed as often as he pleases (a).

Difference
between resi-
dence and
domicil.

Residence and domicile are also two perfectly distinct things. Although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find the party had any other residence in existence or in contemplation (b).

Domicil, what
it is.

Domicil is an idea of law. It is the relation which the law creates between an individual and a particular locality or country (c).

No man can
be without
domicil.

Domicil of
origin.

It is a settled principle that no man shall be without a domicile, and to secure this end the law attributes to every individual, as soon as he is born, the domicile of the father if the child is legitimate, or the domicile of the mother if the child be illegitimate. This is called the domicile of origin, and is involuntary (d).

Legitimation.

The status of the child—with respect to its capacity to be legitimated by the subsequent marriage of its parents—depends wholly on the status of the putative father, not on that of the mother. According to English law, where at the time of the bastard's birth the father has his domicile in England, no

(a) *Udny v. Udny*, (1869) L. R. 1
Sc. App. 441, see per Ld. Westbury
and Ld. Hatherley.

(b) *Bell v. Kennedy*, (1868) L. R. 1

Sc. App. 320, 321, per Ld. Westbury.

(c) *Ibid.*

(d) *Udny v. Udny*, *ubi sup.*

subsequent change of domicile can render practicable the bastard's legitimization (e). But it is the subsequent marriage which gives the legitimacy to a child who has at its birth in consequence of its father's domicile the capacity of being made legitimate by a subsequent marriage; consequently the domicile at the time of the marriage must be domicile in a country which attributes to marriage that effect (f).

A child legitimated by the law of its father's domicile—as where at the birth and the subsequent marriage the parents were domiciled in Holland—although illegitimate according to English law is entitled to a share in the personal estate of an intestate dying domiciled in England, as one of the next-of-kin under the Statute of Distribution (g). But the rule as to the law of the domicile has never been extended to real property in England, and therefore a child born out of wedlock although legitimated by subsequent marriage of parents cannot inherit (h). The succession to chattels real depends also upon the *lex loci rei sitæ* (i).

Rights of child legitimated according to father's domicile though illegitimate by English law.

But the rule that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit real property in England, relates only to the case of descent upon an intestacy, and does not affect the case of a devise of real estate to "children" (k).

Domicil of choice is the creation of the party.

Where a domicile of origin is proved it lies upon the person who asserts a change of domicile to establish it, and it is necessary to prove that the person who is alleged to have changed his domicile had a fixed and determined purpose to make the place of his new domicile his permanent home (l). The abandonment or change of a domicile is a proceeding of a very serious nature and an intention to make such an abandonment must be proved by satisfactory evidence (m).

Domicil of choice.

Burden of proof on person alleging change.

(e) *Udny v. Udny*, *ubi sup.*

(f) *Re Grove*, (1888) 40 C. D. 216.

(g) *Re Goodman's Trusts*, (1881) 27 C. D. 266.

(h) *Doe v. Vardill*, (1826) 5 B. & C. 438.

(i) See *post*, pp. 149, 153.

(k) *Re Grey's Trusts*, [1892] 3 Ch. 89.

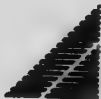
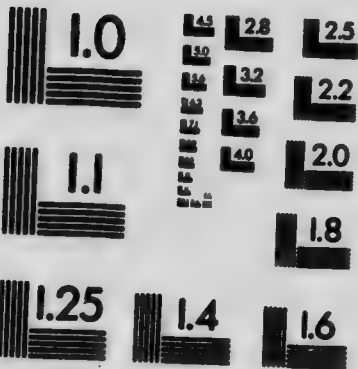
(l) Per Ld. Halsbury, L.C., in *Winans v. Att.-Gen.*, [1904] A. C. 288.

(m) *Huntley (Marchioness) v. Gaskell*, [1906] A. C. 56.



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What constitutes change of domicile.

No person who is *sui juris* can change his domicile without a physical change of place coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence (*n*).

Intention may be inferred from conduct, and there are cases in which domicile has been changed notwithstanding a clear statement that no change of domicile was intended. An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from the circumstances of an intention to remain (*o*).

Domicil of minor.

A new domicile cannot be acquired by a party's own act during pupillage, or until the person is *sui juris* (*p*).

The domicile of a minor follows that of his father (*q*).

Domicil of lunatic after minority.

If a man at the time he attains his majority is of unsound mind, or remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile as regards the lunatic son (*r*).

Of minor during widowhood of mother.

After the death of the father, children remaining under the care of the mother follow the domicile which she may acquire until they are capable of gaining one by acts of their own (*s*). But although the mother, after the father's death, may change the domicile of her children, provided it be without fraudulent views to the succession of the estate, yet the domicile does not necessarily follow that of the surviving mother. For although changing her own, she may, from wise motives, refuse to alter that of her child. For instance, she may acquire an English domicile while the child continues to

(*n*) *Winans v. Att.-Gen., ubi sup.*, per *Ld. Lindley* at p. 299.

(*o*) *Ibid.*

(*p*) *Somerville v. Somerville*, (1801) 5 Ves. 787; *Forbes v. Forbes*, (1854) Kay, 341.

(*q*) *Sharpe v. Crispin*, (1868) L. R. 1 P. & D. 611, 617.

(*r*) *Ibid.*

(*s*) *Pottinger v. Wightman*, (1817) 3 Mer. 67; *Johnstone v. Beattie*, (1843) 10 Cl. & F. 42, at pp. 66, 138.

reside in Scotland (*t*). Moreover, it would seem that it is only during the mother's widowhood that she can change the domicile of her infant, since by her marriage her own domicile is controlled by that of her husband (*u*).

It would seem also that a tutor cannot change the domicile of his pupil (*x*).

By marriage, the domicile of the husband becomes that of the wife (*y*), and the wife's domicile follows the husband's during the coverture, since there is an overruling presumption of law, which cannot be rebutted by any fact, contract or otherwise, that they have one residence and one domicile (*z*); and the domicile so acquired is not changed by the death of the husband; by that event her domicile prior to the marriage does not revert (*a*).

Domicil of wife.

In the absence of a decree of judicial separation a married woman living apart from her husband has no power to change her domicile (*b*). There would seem to be no reason why she should not have power to change her domicile after sentence of judicial separation (*c*).

Where upon marriage a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions wherever the spouses may afterwards be domiciled (*d*).

Matrimonial contract not affected by change of domicile.

The same rule applies where, in the absence of a written contract, the law of the country where they were domiciled at the time of the marriage provides what is equivalent to a written contract, as, for instance, the system of community of goods in France, and in such case a change of domicile from

(*t*) *Re Beaumont*, [1893] 3 Ch. 490.

(*u*) *Ibid.*

(*x*) See *Pottinger v. Wightman*, *ubi sup.*, referring to *Pothier*.

(*y*) *Countess of Dalhousie v. M'Douall*, (1840) 7 Cl. & F. 817.

(*z*) *Warrender v. Warrender*, (1835) 2 Cl. & F. 488, 528.

(*a*) *Gout v. Zimmerman*, (1847) 5 N. C. 440.

(*b*) *Dolphin v. Robins*, (1859) 7 H. L. C. 391, 417.

(*c*) *Ibid.*, and see 20 & 21 Vict. c. 85, ss. 16, 21.

(*d*) *De Nicols v. Curlier*, [1900] A. C. 21. The rule that the law of the matrimonial domicile applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law: *Re Fitzgerald*, [1904] 1 Ch. 573.

France to England will not affect the community (e). Where, however, the law of the country where they were domiciled at the time of the marriage makes no settlement at all, but ignores the separate legal existence of the wife altogether, as was formerly the case in England; or where the rights attach equally upon spouses who "in the married state" become there domiciled, at least so long as that domicile continues, as in the case of *communio bonorum* in Scotland, the rights of the wife shift with the change of her husband's domicile, and the wife is to look to the law of the country where the husband dies domiciled for the right she is to enjoy in case the husband thinks proper to die intestate (f).

Effect of consular office in foreign country.

Military service of the Crown.

Where duties necessarily require residence for indefinite period.

The mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country (g).

A British subject does not by entering into and remaining in the British army abroad abandon the domicile which he had at the time when he entered into the service (h). But where an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India (i).

Effect of Anglo-Indian domicile.

A domicile in India is, in legal effect, a domicile in the province of Canterbury; and the law of England is therefore to be applied to the distribution of the property of intestates there domiciled. Moreover, it would seem the laws of England and India are now the same as regards the validity of Wills (k).

Residence in China;

in Egypt;

British subjects resident in Chinese territory cannot acquire in China a domicile similar to that existing in India and commonly known as Anglo-Indian (l). Nor does permanent abode in Cairo under British protection by a person

(e) *De Nicols v. Curlier*, *ubi sup.* 165.

(f) *Lashley v. Hog*, (1804) 4 Paton, 581; and see *De Nicols v. Curlier*, *ubi sup.*, at p. 27.

(g) *Sharpe v. Crispin*, (1868) L. R. 1 P. & D. 611.

(h) *Re Macreight*, (1885) 30 C. D.

165.

(i) *Forbes v. Forbes*, (1854) Kay, 341.

(k) *Williams* (10th ed.) 1268.

(l) *Re Tootal's Trusts*, (1882) 23 C. D. 532.

having a Turkish domicil of origin attach to him an Anglo Egyptian domicil, since there is no such thing as domicil arising from society and not from connection with a locality, and Cairo is not a British possession governed by English law. Residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice (*m*).

in ex-territorial community.

Stat 24 & 25 Vict. c. 121 provides for conventions being made with foreign countries that no British subject dying resident in such foreign country, and no subject of any such foreign country dying resident in Great Britain or Ireland, shall acquire a domicil in such foreign country or Great Britain or Ireland, as the case may be, without having so resided for one year immediately preceding his or her decease and without having made and deposited as provided by the Act a declaration in writing of his or her intention to become domiciled in such foreign country. No convention, however, having as yet been entered into under this statute, its provisions are inoperative.

Conventions negating acquisition of domicil.

SECT. 2.—*Of the application of the law of Domicil in the Administration of Assets.*

The domicil of a deceased testator or intestate furnishes the governing rule for determining the succession to moveable property—that is, questions of testacy and intestacy, of the construction of the Will, and of the rights of those who claim to be next-of-kin (*n*).

Succession to moveable property.

The rule as to the law of the domicil has never been extended to real property in England (*o*), and the succession to chattels real depends also upon the *lex loci rei sitæ* (*p*).

Succession to immoveable property.

"Mobilia sequuntur personam."—Personal property wherever

"Mobilia sequuntur personam."

(*m*) *Abd-ul-Messih v. Farra*, (1888) 13 App. Cas. 431. 438.

(*n*) *Enohin v. Wylie*, (1862) 10 H. L. C. 1; *Abd-ul-Messih v. Farra*, (1888) 13 App. Cas. 431, 437.

(*o*) *Doe v. Vardill*, (1826) 5 B. & C.

(*p*) *Freke v. Lord Carbery*, (1873) L. R. 16 Eq. 461; *Pepin v. Bruyère*, [1902] 1 Ch. 24; *Re Moses*, (1908) W. N. 156 (testacy); *Duncan v. Lawson*, (1889) 41 C. D. 394 (intestacy).

situate follows the person, and therefore the rights of a person constituted in England the representative of a party who died domiciled in England are not limited to the personal property in England, but extend to personal property wherever locally situate (q).

The effects of the deceased are assets wherever situated, whether at home or abroad (r), and an English administrator who, without obtaining a foreign grant of administration, obtains possession abroad of assets of the deceased, will be liable to account for such assets in the administration in this country, or on an issue upon assets in answer to an action at law by a creditor of the deceased (s). But to enable a person to act as the personal representative in this country of a person who died domiciled abroad he must obtain a grant either of probate or letters of administration in England (t).

Although the domicile of a deceased testator or intestate furnishes the governing rule for determining the succession to moveable property (u), yet that being ascertained the *forum* in which such rights may be vindicated does not depend on the domicile.

The jurisdiction of the Court of Chancery is *in personam*. It acts upon the person whom it finds within its jurisdiction and compels him to perform the duty which he owes to the plaintiff. This jurisdiction will be exercised *ex debito justitiæ* unless it is shown that it would be an abuse of the process to make an order (x).

English law adopts the law of the domicile as it stands at the time of the death, and does not adopt and give effect to retrospective changes that the legislative authority of the foreign country may make in that law (y).

Where the title has been adjudicated upon by the Courts

Jurisdiction to administer independent of the *lex domicilii*.

English law adopts the law of domicile at death.

Adjudication by Court of domicile, until reversed by same Court, conclusive.

(q) *Spratt v. Harris*, (1833) 4 Hagg. 405.

(r) *Att.-Gen. v. Dimond*, (1831) 1 Cr. & J. 356, 370.

(s) *Westlake Priv. Int. Law* (4th ed.) s. 103; and see *Ewing v. Orr-Ewing*, (1883) 9 App. Cas. 34.

(t) See *post*, p. 154.

(u) *Ante*, p. 149.

(x) *Ewing v. Orr-Ewing*, (1883) 9 App. Cas. 34; (1885) 10 App. Cas. 453, 502; but see *Deschamps v. Miller*, [1908] 1 Ch. 856.

(y) *Lynch v. Provisional Government of Paraguay*, (1871) L. R. 2 P. & D. 268.

of the domicile such adjudication is binding upon and must be followed by the Courts of this country, and if the decision of the foreign tribunal is wrong recourse must be had to the mode of appeal provided in the foreign country (z).

Although *mobilia sequuntur personam* for purposes of succession, yet the *lex fori rei sitæ* must be observed not only in the collection of the assets but also in the administration of those assets, when collected, among creditors. For instance, if a man dies domiciled in England possessing assets in France, the French assets must be collected in France and distributed among creditors according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori* and for no other reason. So if it should happen that a man died domiciled in France, leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected, must be distributed according to the law of England. No doubt in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the Court would be astute to equalise the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. The English rule is that all creditors are to be treated equally, subject to what priorities the law may give them, from whatever part of the world they come, consequently in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors (a).

Lex fori rei sitæ observed in administration of assets among creditors.

All creditors treated equally subject to what priorities the *lex fori* may give them.

Where the representatives in the two countries are different persons, the duty of the ancillary administrator in England is to pay the creditors coming in according to the *lex fori* and if there is a surplus to transmit it to the principal administrator (b).

Duty of ancillary administrator.

(z) *Re Trufort*, (1887) 36 C. D. 600; and see *Pemberton v. Hughes*, [1899] 1 Ch. 781.

(a) *Re Kloebe*, (1884) 28 C. D. 175.

(b) *Cook v. Gregson*, (1854) 2 Drew. 286, 288; *Eames v. Hacon*, (1881) 18 C. D. 347.

Since the assets in one particular jurisdiction are liable to pay the debts there contracted, and the creditors may maintain against the local administrator an action for that purpose, it follows that the clear net residue only is that to which the administrator constituted by the Court of the domicile is entitled (c).

Administra-
tion decree of
English Court
not limited
to English
assets.

It is not the practice of the English Court in making administration decrees with respect to assets of persons domiciled abroad to anticipate that there will be any proceeding in the Court of the domicile for administration and to limit the decree to the English assets, but will make the ordinary decree for the administration of the personal estate of the testator or intestate. If proceedings are subsequently instituted in the Court of the domicile the English Court will, of course, according to the comity of Courts, adopt those proceedings according to the necessities and exigencies of the case (d). And the Court has power to stay vexatious and unnecessary proceedings here, as where there is a pending suit in the Court of the domicile in which the estate can be administered and all questions that can arise in the course of the administration decided (e).

Although the Court of the country where ancillary administration is granted has jurisdiction to decree a final distribution of the assets, yet whether the Court ought to decree such a distribution or to remit the property to the *forum* of the domicile of the deceased is a matter of judicial discretion dependent upon the particular circumstances of each case (f).

Effect of a
disposition
invalid by the
law of
domicil.

If a British subject domiciled in a foreign country, by his Will validly appoints an executor, but makes a disposition of his personal property which, though valid by the laws of England, is invalid by the laws of that foreign country, the executor on obtaining probate here must distribute the property as if the deceased had died intestate (g).

(c) *Kames v. Hacon*, (1880) 16 C. D. 407, at p. 410.

(d) *Stirling-Maxwell v. Cartwright*, (1879) 11 C. D. 522.

(e) *Re Orr-Ewing*, (1882) 22 C. D. 456, 469, per Cotton, L.J.

(f) See Story's Eq. Jur., s. 589, referred to by Ld. Selborne in *Ewing v. Orr-Ewing*, (1885) 10 App. Cas., 453, 514.

(g) *Thornton v. Curling*, (1824) 8 Sim. 310.

Leasehold property is dealt with as immoveables, and is governed by the law of the country where the land which is the subject of the lease is situate in the same manner as lands held for a freehold tenure. Consequently the beneficial interest in leasehold property in England will not pass under a Will executed according to the law of the testator's foreign domicile but not attested as required by the Wills Act, 1837, notwithstanding that letters of administration with the Will annexed have been granted by the Probate Division (*h*).

Leasehold and freehold property governed by the *lex loci*.

The same principle would apply to a Will of a British subject duly executed by reason of Lord Kingsdown's Act (*i*), though invalid by the law of the place of the testator's domicile (*k*).

When speaking of the law of domicile, as applied to the law of succession, it is meant not the general law, but the law which the country of domicile applies to the particular case under consideration. Such law may be totally different as applied to a natural born subject of the country.

Law of domicile not necessarily the general law, but may be a particular law applicable to foreigners.

For instance, by the Belgian law the succession to an English born subject dying domiciled in Belgium without having obtained royal authority to establish a domicile there is not governed by the law applicable to its natural-born subjects, but by the law of the deceased's own country (*l*). So also in Turkey, though no subject of that country can make a Will, yet by treaties between Great Britain and the Porte an Englishman domiciled there may make a Will and the succession to his personal estate is to follow the law of England (*m*).

Where a person acquires, according to English law, a domicile of choice in a country whose laws do not recognise domicile, but distribute the moveables of a foreigner, dying within its jurisdiction, according to the law of his nationality, and dies there, the English Courts will distribute his moveables according to the law of his domicile of origin (*n*).

Effect of law of domicile of choice being according to law of nationality.

(*h*) *Pepin v. Bruyère*, [1902] 1 Ch. 855.

(*i*) 24 & 25 Vict. c. 114, *post*, p. 157.

(*k*) Dicey, *Conf. of Laws*, p. 694.

(*l*) *Collier v. Rivas*, (1841) 2 Curt.

(*m*) *Maltass v. Maltass*, (1844) 1 Robert. 67.

(*n*) *Re Johnson*, *Roberts v. Att.-Gen.*, [1903] 1 Ch. 821.

Claim of
Crown on
death of
bastard.

Although the law of the country in which the deceased was domiciled at the time of his death decides the course of distribution or succession as to moveable personalty, yet where an Austrian bastard who was entitled to a fund in Court in this country died in Vienna intestate and without heirs, the Austrian Government having claimed the fund, it was held that as the right claimed was not in the nature of a succession the maxim *mobilia sequuntur personam* did not apply, and that the Crown, by the law of England, was entitled to the fund as *bona vacantia* (o).

SECT. 8.—*Of Grant of Probate and Letters of Administration in connection with Foreign Domicil and Foreign Assets.*

Foreign representative must obtain representation in Probate Division to enable him to act here.

English Court will not administer in the absence of an English representative.

In order to enable a person to act as the personal representative in this country of a person who died domiciled abroad he must obtain a grant either of probate or letters of administration from the Probate Division here (p).

Not merely is no action maintainable here by a person in the character of executor or administrator until his title as such has been recognised by the Probate Division, but the English Court will not administer property of any person who died intestate abroad, at the suit of a creditor (q), or legatee (r), in the absence of a person authorised to represent his estate either by the Probate Division or the Rules of the Supreme Court.

Effect of sealing Irish probate or letters of administration and Scotch confirmation.

Effect of Colonial Probates Act, 1892.

Sealing by the Probate Division in England of probate or letters of administration granted by the Court of Probate in Ireland (s) and of a Scotch confirmation (t) gives them the like force and effect as if probate or letters of administration had been granted in England. So also the Colonial Probates Act, 1892 (u), s. 2, provides for the recognition in the United

(o) *Re Barnett's Trusts*, [1902] 1 Ch. 847.

(p) *Fernandes' Executors' Case*, (1870) L. R. 5 Ch. 314; *New York Breweries Co. v. Att.-Gen.*, [1899] A. C. 62.

(q) *Lowe v. Fairlie*, (1817) 2 Madd.

101.

(r) *Logan v. Fairlie*, (1825) 2 Sim. & St. 284.

(s) 20 & 21 Vict. c. 79, s. 95; 21 & 22 Vict. c. 95, s. 29.

(t) 21 & 22 Vict. c. 56, s. 12.

(u) 55 & 56 Vict. c. 6.

Kingdom under Order in Council of probates and letters of administration granted in British possessions, which when sealed with the seal of the Court of Probate in the United Kingdom shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court, and s. 8 extends the application of the Act to probate or letters of administration granted by British Courts in foreign countries.

The foundation of the jurisdiction of the Probate Division is that there is property (formerly personal property) of the deceased to be distributed within its jurisdiction (*x*). If there is no property here, then whether the person who was domiciled abroad died testate (*y*) or intestate (*z*) the Court has no jurisdiction to grant administration.

Foundation of jurisdiction of Probate Division is property within its jurisdiction.

Probate will be necessary if a testator purports to exercise a power of appointment affecting property in this country, although the testator left no property of his own here (*a*).

The Finance Act, 1894, does not affect the question what document ought to be admitted to probate (*b*). If a testator domiciled here makes a Will disposing of his property and dies leaving foreign moveable property, but without leaving any property in this country, should there be no occasion to obtain probate here the estate duty payable under s. 1 of the Finance Act, 1894, will be accepted on an account (Form C. 1) (*c*).

If a Will be made in a foreign country and proved there, disposing of personal property in this country, the executor must prove the Will here also (*d*).

Foreign Will disposing of property here must be proved here. Mode of proving foreign Will.

Where the Will is proved in the foreign country and the original Will is deposited there and cannot be removed the grant of probate here is of a copy of the original Will properly

(*x*) In the Goods of Tucker, (1864) 3 Nw. & Tr. 585.

(*y*) In the Goods of Lock, (1876) 24 W. R. 281.

(*z*) Evans v. Burrell, (1859) 28 L. J. P. & M. 82; and see In the Goods of

Sanders, [1900] P. 293.

(*a*) See *ante*, p. 83, and *post*, p. 158.

(*b*) In the Goods of Murra: [1896] P. 65, 72.

(*c*) See *post*, p. 174.

(*d*) Williams (10th ed.) 271.

proved to be such limited until such time as may elapse before the original Will is brought in (e).

If two independent Wills are made, one disposing of the testator's property in this country and the other disposing of his property abroad, the former alone should be admitted to probate here. If, however, the two Wills are not independent the case is different. The English Will, if last, may incorporate the foreign Will and then the probate should include both documents, as they virtually become one document. So also the foreign Will, if last, may incorporate the English Will, in which case the foreign Will would not be limited in its operation to property abroad, and both would be included in the probate (f). When the foreign Will is not included in the probate a copy must, in accordance with the practice, be filed in the registry, together with an affidavit verifying it, and a note must be appended to the probate that such affidavit has been filed (g).

As to codicils
to Will proved
abroad.

If a Will has been proved abroad it is the practice of the Probate Division to require that codicils should be proved in the Court from which the probate of the Will has been obtained before granting probate here (h).

Will in a
foreign lan-
guage.

If a Will is in a foreign language the probate is granted of a translation of the same by a notary public, or a person whose competency is vouched for by his official position. The executor is sworn to the foreign original or copy, but the translation alone is engrossed and registered (i).

Court guided
by law of
domicil in
deciding as to
validity of the
instrument.

In granting probate the Court will be guided by the law of the country where the deceased was domiciled in determining as to the validity of the instrument as a Will. For instance, the Will of a married woman, a native of Spain, domiciled there, was admitted to probate here upon affidavits that by the law of Spain she had power to bequeath as a *feme sole* the

(e) In the Goods of Lemme, [1892] P. 89; In the Goods of Von Linden, [1896] P. 148.

(f) In the Goods of Murray, [1896] P. 65, 71.

(g) *Ibid.*, at p. 73.

(h) In the Goods of Miller, (1883) 8 P. D. 167.

(i) Tr. & Co. P. P. (14th ed.) p. 51.

property which she brought her husband on her marriage (k). So codicils made by a British-born subject domiciled in the Portuguese dominions were refused probate as not being executed according to the law of Portugal (l).

With regard to the manner of execution of Wills of British subjects of personal estate, Lord Kingsdown's Act (24 & 25 Vict. c. 114) provides, s. 1, that "every Will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall as regards personal estate (m) be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

Lord Kingsdown's Act (24 & 25 Vict. c. 114).

Will of British subject made out of the United Kingdom.

Sect. 2 provides that "every Will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Will of British subject made within the United Kingdom.

Sect. 3 of the same Act, which section is not limited in its operation to the Wills of British subjects (n), provides that "no Will or other testamentary instrument shall be held to be

Effect of subsequent change of domicile.

(k) In the Goods of Maraver, (1828) 1 Hagg. 498.

(l) Stanley v. Barnes (1830), 3 Hagg. 373.

(m) These words include leaseholds. *Re Grassi*, [1905] 1 Ch. 584.

(n) In the Estate of Groos, [1904] P. 269. But query whether the change

contemplated by the section is not from a foreign domicile to an English domicile. In the Goods of Reid, (1866) L. R. 1 P. & D. 74, a Scotchman had at his death acquired an English domicile, and in the estate of Groos, *ubi sup.*, a Dutch lady had subsequently acquired an English domicile.

revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."

Saving of
Wills valid if
Act had not
been passed.

By s. 4 "nothing in this Act contained shall invalidate any Will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such Will or other testamentary instrument may be revoked or altered by any subsequent Will or testamentary instrument made valid by this Act."

AS TO WILLS MADE IN EXECUTION OF POWERS OF APPOINTMENT.

Probate of
Wills made in
execution of
powers.

A Will disposing of personal estate, situate in this country, made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of the party making it (*o*). A testamentary appointment will not be read or established in the Chancery Division unless it has been proved as a Will (*p*). The grant of probate is conclusive that the instrument proved is the Will of the testator, but it is not conclusive as to its construction, or the rights to the property disposed of by the Will (*q*). The construction is governed by the law applicable to the instrument creating the power, whatever may be the domicile of the donee of the power (*r*). The execution of any power of appointment validly created and given to a foreigner is in no way affected by any disability which he or she may be under to dispose of his or her own property by the laws of his or her domicile (*s*).

Testamentary
appointment
must be
proved as a
Will.

Construction
governed by
law applicable
to instrument
creating the
power.

When foreign
Will must
comply with
formalities of
power or
Wills Act.

A power to appoint by Will duly executed, and not requiring any special formalities of execution, is well exercised by a

(*o*) *Tatnall v. Hankey*, (1838) 2 Moo. P. C. 342; In the Goods of Alexander, (1860) 29 L. J. P. & M. 93; In the Goods of Hallyburton, (1866) L. R. 1 P. & D. 90; In the Goods of Huber, [1896] P. 209; In the Goods of Tréfond, [1899] P. 247.

(*p*) *Ante*, p. 83.

(*q*) *D'Huart v. Harkness*, (1865) 34 B. 324; *Poney v. Hordern*, [1900] 1 Ch. 492; *Re Megret*, [1901] 1 Ch. 547.

(*r*) *Re Bald* (1897), 76 L. T. 462; *Poney v. Hordern*, *ubi sup.*; *Re Megret*, *ubi sup.*

(*s*) *Poney v. Hordern*, *ubi sup.*

Will good according to the law of the country of the testator's domicile, though it does not follow the forms of the Wills Act, 1837 (t). Where, however, special formalities are required by the instrument creating the power, it is not enough that the instrument purporting to execute the power should be a Will valid according to the law of domicile, but in cases where the provisions of the Wills Act do not apply the Will must comply with the terms of the power (u). Equity will, however, in certain cases, aid the defective execution of a power (v).

A Will which is only valid by virtue of Lord Kingsdown's Act (x) is not a valid execution of a power, whether special or general, unless it is executed in the presence of and attested by two witnesses as required by ss. 9 and 10 of the Wills Act (y).

In *Re Price* (z), there being indications upon the face of the Will that the testatrix, a domiciled French subject, wrote it with reference to the law of England as well as the law of France, Stirling, J., held that he was entitled to apply the same rules of construction which would by English law be applied to a Will in the same terms and of the same date, including the rule of construction introduced by s. 27 of the Wills Act, and that the general bequest operated as a valid execution of the general power. It would have been otherwise had the construction been according to the law of the place applicable to the document executed by the donee, since s. 27 is a rule for English construction (a).

When general bequest operates as a valid execution of a general power.

Where a married woman dies domiciled abroad, having made a Will in exercise of a power under an English settlement, which is a valid execution of the power but is not in the form required by the law of her domicile, the Court does not grant probate to the executor named in the Will, but will make a grant of administration with the Will annexed, and in the

Will of married woman not in form required by law of domicile.

(t) *D'Huart v. Harkness*, (1865) 34 B. 324; *Re Price*, [1900] 1 Ch. 442.

(u) *Barretto v. Young*, [1900] 2 Ch. 339.

(v) *Re Walker*, [1908] 1 Ch. 560, and see *Farwell on Powers*, 2nd ed., p. 335.

(w) *Ante*, p. 157.

(y) *Re Kirwan's Trusts*, (1883) 25

C. D. 373; *Hummel v. Hummel*, [1898] 1 Ch. 642.

(z) *Ubi sup.*

(a) *Re D'Este's Settlement Trusts*, [1903] 1 Ch. 898; *Re Scholefield*, [1905] 2 Ch. 408; and see *Re Baker's Settlement Trusts*, (1908) W. N. 161.

absence of a consent by the husband the grant will be to the appointee limited to such property as the deceased had power to dispose of and did dispose of by the Will but, with such consent, the Court will make a general grant with the Will annexed (b).

PRINCIPLE ON WHICH GRANTS OF ADMINISTRATION ARE MADE.

Grant made
to person
entitled by
law of
domicil.

The principle on which grants should be made by the Probate Division in respect of persons domiciled in foreign countries is that regard should be had to the law of the domicil in order to determine what power or authority has been vested in anyone with regard to dealing with the estate, and then to give such a grant to such person as will enable him to perform in this country the duties imposed on him (c).

When an application is made to the Probate Division either for an original or a *de bonis non* administration by a person who satisfies the Court that by the proper authority of the country of the domicil of the deceased he has been authorised to administer the estate of the deceased, the Court will, without further consideration, grant power to that person to administer the English assets (d).

Where a testator died domiciled in Belgium leaving a Will and codicil in English form appointing executors, and also leaving a Belgian Will, the Court made a grant of administration with all three documents annexed in favour of two persons who had been appointed administrators of the deceased's estate abroad in accordance with the law of the domicil, notwithstanding the opposition of the persons named executors in the English Will (e).

Limited grant
where powers
given by Will
fall short of
powers of
an English
executor.

Where in a foreign Will a person is in terms named executor, probate will be granted in this country to that person, but where the powers granted to a person in the Will fall short of the powers of executors according to English law,

(b) In the Goods of Tréfond, [1899] P. 247; In the Goods of Vannini, [1901] P. 330.

(c) In the Goods of Briesemann, [1894] P. 260.

(d) In the Goods of Hill, (1870) L. R. 2 P. & D. 99.

(e) In the Goods of Meatyard, [1903]

P. 125.

there will be a grant to him of administration with powers as near as may be to those granted by the Will (*f*).

But where the Court of the domicile has made a grant of administration limited in time the English Court will under s. 78 of the Court of Probate Act, 1857, make a general grant to the foreign administrator (*g*).

Where the applicant has not been in terms appointed executor, but the Court is able to infer that it was the intention of the testator that he should have the power of an executor, that is, he is executor according to the tenor, probate will be granted to him as executor according to the tenor (*h*).

Probate may be granted as executor according to the tenor.

The Court will not follow the grant of the foreign domicile if the administrator appointed by the foreign Court is by the law and practice of this country personally disqualified from taking a grant here, as for instance a minor (*i*).

When Court will not follow grant of foreign domicile.

The rule to follow the foreign grant does not apply where the foreign grant is made not to the person entitled to it, but to some other person with the consent of the person entitled (*k*).

Except where a convention between this country and any foreign State has been made in pursuance of s. 4 of 24 & 25 Vict. c. 121 (*l*) the law of this country does not recognise any right of a foreign consul to take possession of the property of a foreigner dying here *in itinere*, notwithstanding he has such a right by the law of the country of the domicile of the deceased, and the Court here will not make a grant of administration to him on that ground alone (*m*).

Where a party applies for administration as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported without exhibiting to the Court a power of attorney from the person so entitled (*n*).

Agent applying for grant must exhibit proper authority from person entitled.

(*f*) In the Goods of Von Linden, [1896] P. 148, per Jeune, P.

(*g*) In the Estate of Levy, [1908] P. 108.

(*h*) *Ibid.*

(*i*) In the Goods of Meatyard, [1903] P. 125, per Jeune, P.

(*k*) In the Goods of Weaver, (1867)

36 L. J. P. & M. 41.

(*l*) See *post*, p. 149. It would seem no convention has ever been made under this Act.

(*m*) *Aspinwall v. The Queen's Proctor*, (1839) 2 Curt. 241.

(*n*) In the Goods of the Elector of Hesse, (1827) 1 Hagg. 93.

Evidence of
domicil not
required if no
question
raised.

In the case of a foreigner dying intestate within the British dominions, it would seem that, if no question is raised, the Court will grant administration to the person entitled to the effects of the deceased according to the law of his own country without evidence as to his domicil (o).

Decree of
Court of
domicil con-
clusive as to
title to
administer.

The Court here considers itself bound by the decree of the Court of domicil; so that in the case of a domiciled Frenchman, the French Court having decreed that the time limited by French law for the execution of the executorship by the person nominated executor had ceased, and that he had no longer any right to intermeddle, the Court here refused to grant probate to him (p).

(o) Williams (10th ed. 938.

(p) *Laneville v. Anderson*, (1860) 2 Sw. & Tr. 24.

CANADIAN NOTES.

Where a will has been made and probate granted to the executor in a foreign country, he, as the person entitled to the grant, should be appointed in any ancillary administration of property in another country. But this is not the rule applicable necessarily to cases of intestacy, where those entitled have been passed over by the Courts of the domicile. *Re O'Brien* (1884), 3 O.R. 326.

Ancillary
administra-
tion.

"The case of *In the Goods of E. S. Hill*, L.R. 2 P. & D. 89, which was cited to me, was one of testacy, and merely exemplifies an application of what is undoubtedly the general rule, that the grant of administration by the Courts of the domicile governs the discretion of the foreign Court in decreeing administration to the same person. This is, however, by no means the invariable rule even in cases of testacy." *Re O'Brien* (1884), 3 O.R. 326, per Boyd, C.

In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with creditors in Ontario. *Milne v. Moore* (1894), 24 O.R. 456.

Where a testator dies in a foreign country leaving assets in Ontario the Court at the instance of a legatee will restrain the withdrawal of the assets from the jurisdiction notwithstanding that there are creditors in the foreign country and none here. *Shaver v. Gray* (1871), 18 Gr. 419.

Restraining
withdrawal
of assets.

In an action by the administrator in Ontario on a life insurance policy of deceased payable in Montreal, it was held that as the plaintiff had not obtained letters of administration in Quebec he had no right to sue for the money. *Pritchard v. Standard Life Assurance Co.* (1884), 7 O.R. 188.

An injunction was awarded at the suit of an heir, to restrain execution against the lands of a deceased person in the hands of his administrator, the defendant having administered to the estate in England only, and there being at the

time no Canadian administrator. *Grant v. McDonald* (1860), 8 Gr. 468.

Revocation
of grant
refused.

Only one of the next of kin, the sister, of an intestate resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a Surrogate Court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain, from the renunciation, that this statement was intended to refer only to the next of kin resident in Ontario. It was held that the Surrogate Court had before it all those who were required by section 41 of the Surrogate Courts Act, R.S.O. 1897, c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the advanced age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendant. (It would seem that, even if the discretion had been improperly exercised the grant would not have been revoked, there being no fraud or misrepresentation in the case.) *Carr v. O'Rourke* (1902), 3 O.L.R. 632.

Effect of Foreign Proceedings.

Foreign law.

An intestate died domiciled in New Brunswick, leaving personal property in New Brunswick and in Maine, and administration of the estate was taken out in both countries by the same person. The proceeds of the Maine property were brought by the administratrix to New Brunswick. The deceased was indebted to creditors in both countries. An administration suit was brought in New Brunswick against the administratrix by the New Brunswick creditors. By a decree of the Maine Probate Court the Maine assets were ordered to be distributed among the creditors of the deceased in accordance with the provisions of a Maine Statute. The effect would be that the Maine creditors would be paid their share

of the whole estate without contributing to the costs of the administration suit in New Brunswick. It was held, however, that the costs of the administration suit could not be charged against the Maine assets and that their distribution must be in accordance with the Maine law. *Warner v. Gibson* (1894), 1 Eq. N.B. 65.

The practice of the Surrogate Courts in Ontario is to apply the provisions of section 59 of the Surrogate Courts Act (R.S.O. 1897, c. 59), relating to grants of administration, more liberally than do the English Courts the corresponding provisions of the English Probate Act. *Carr v. O'Rourke*, 3 O.L.R. 632.

A testator who died domiciled in the United States, leaving property there and in Ontario, appointed certain persons executors, making them also trustees of four-sixths of his estate, and the proper Probate Court in the United States granted probate to them in 1900. In 1903 they tendered to that Court their resignation as executors, though not as trustees, and requested and obtained the appointment of a trust company as administrators *de bonis non, cum testamento annexo*, in their place. In 1904, however, they resumed an application, which had remained suspended since 1900, to the Surrogate Court of a county in Ontario for ancillary probate, which was opposed by the beneficiaries of the estate in Ontario, who asked for administration *de bonis non*, to be granted to the trust company or its nominee. The Surrogate Court refused to grant the application of the executors and followed the grant to the trust company and held that it could not look into any of the circumstances which led to that grant. The Divisional Court affirmed this decision. *In re Medbury, Lothrop v. Medbury* (1906), 11 O.L.R. 429.

The question whether the law of the domicile or the law of the situs governs is sometimes important in the case of a debtor domiciled in some province of Canada where debts are payable *pari passu*, and leaving assets in a foreign country and where administration is taken out in both countries. The

Foreign
domicile.

Law of situs
prevails.

better view seems to favour the law of the situs of the assets as the governing law. See *Milne v. Moore* (1894), 24 O.R. 456.

The powers and obligations of foreign administrators, dealing in Canada with foreign assets, and settling claims of Canadian creditors, are discussed in *Grant v. McDonald* (1860), 8 Gr. 468.

Death of
foreign
petitioner.

A. M., a person domiciled in Scotland, presented a petition in the Probate Court at Halifax praying for the proof in solemn form of the will of M. and afterwards died, and his sole acting executor petitioned to be allowed to represent his estate. An order was made by the Surrogate on production of a certified copy of the will, a certificate of A. M.'s death and confirmation of petitioner's appointment as executor. This order was appealed from on the ground that a Probate Court in Nova Scotia could not take notice of such death or appointment, without letters of administration being obtained in Nova Scotia, but it was held that the order was well made. *Re McLeod* (1888), 21 N.S.R. 241.

Action on
behalf of
foreigners
maintainable.

The administrator within the Province of Ontario of a foreigner who was killed in an accident in Ontario, through his employer's negligence, is entitled, under the amendment to the Fatal Accidents Act, as embodied in s. 2 R.S.O., c. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death. *Gyorgy v. Dawson* (1906), 13 O.L.R. 381.

As to insufficient certificate of foreign proceedings. See *Re Wolf* (1908), 8 W.L.R. 690.

CHAPTER XII.

OF DEATH DUTIES.

DEATH duties are now mainly regulated by the Finance Act, 1894 (57 & 58 Vict. c. 80), the Legacy Duty Act, 1796 (36 Geo. III. c. 52), the Succession Duty Act, 1858 (16 & 17 Vict. c. 51), and the various amending Acts (a).

In this treatise it is not intended to deal with these Acts beyond pointing out generally the nature of the duties, the requirements of the Commissioners of Inland Revenue, and the liability of executors and administrators under the Acts for the death duties for which they may be accountable.

SECT. 1.—*Of Estate Duty and Settlement Estate Duty.*

Prior to the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), duties were imposed upon probates of Wills and letters of administration, but s. 27 of that Act substituted duties to be charged and paid on an affidavit to be required and received from the person applying for the probate or letters of administration; and s. 30 provides that no probate or letters of administration shall be granted in England or Ireland unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit if liable to stamp duty was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

Charged and paid on affidavit.

No grant of probate or letters of administration without certificate that affidavit has been delivered.

Instructions as to Estate Duty in respect of property passing on the deaths of persons dying after 1st August, 1894, are issued by the Commissioners (Form A—2). The Instructions are in paragraphs numbered 1 to 83 with references to the sections of the Finance Act, 1894, unless

(a) The Acts are fully set out and 1692 *et seq.*, where also a short history of death duties will be found. considered in Williams (10th ed.)

otherwise stated, and it will be sufficient for the present purpose to give a summary of these instructions.

Estate duty.

"I. Estate Duty, except as expressly provided, is leviable upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person who dies after the 1st August, 1894 [see ss. 1 and 24]."

What property passes on death.

Paragraphs 2—18 indicate what the property so passing includes, *inter alia*, property of which the deceased was competent to dispose at his death, whether he actually disposed of it by his Will or not; donations *mortis causa*; *inter vivos* gifts made by the deceased within a year of his death without reservation; other *inter vivos* gifts made by the deceased with reservation to himself; joint ownership; policies of assurance; annuities the benefit of which arose on the death of the deceased.

Paragraphs 19—31 indicate in what cases Estate Duty is not payable, and paragraph 29 includes objects of national, scientific, or historic interest and settled so as to be enjoyed in succession in kind only.

Aggregation.

Paragraphs 33—36 indicate what property is to be aggregated for determining the rate of Estate Duty to be paid, and in what cases property is not to be aggregated.

Settlement estate duty.

"37. (1.) Where property, in respect of which Estate Duty is leviable, is settled by the Will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose [see s. 22 (2) (a)] of the property, a further Estate Duty called 'Settlement Estate Duty' is leviable upon the principal value of the settled property, except where the only life interest in such property, after the deceased's death, is that of the husband or wife of the deceased [see s. 5 (1) (a)], or where the disposition took effect before the 2nd August, 1894 [see s. 21 (1) (4)], or, under the deceased's Will, where the net value of the property in respect of which Estate Duty is leviable on the death of the deceased, exclusive of property settled otherwise than by the deceased's Will, does not exceed £1,000. [See s. 16 (8).]"

"(2.) Where on a death on or after the 1st July, 1898,

Settlement Estate Duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property is to be repaid. [See Finance Act, 1896, s. 14.] "

"(3.) 'Settled Property' is property comprised in a 'settlement' [see s. 22 (1) (h)], and a 'settlement' is any instrument which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust. [See s. 22 (1) (i).] "

Settled property defined.

"38. Settlement Estate Duty leviable in respect of personal property settled by the deceased's Will (unless the Will contains an express provision to the contrary) is, *where the deceased died on or after the 1st July, 1896*, to be payable out of the settled property in exoneration of the rest of the deceased's estate. [See Finance Act, 1896, s. 19 (1).] "

Settlement Estate Duty to be paid out of the settled property.

"39. Where lands or chattels are so settled by Act of Parliament or Royal grant that no one of the persons successively entitled can alienate the same, the Settlement Estate Duty is not payable. [See s. 5 (5).] "

Crown entails.

"40. The *ad valorem* stamp duty (if any) charged on a settlement may be deducted from the Settlement Estate Duty payable thereunder [see s. 5 (4)], but the settlement must be produced in support of the deduction."

Deduction of stamp duty paid on settlement.

"41. The executor of the deceased is to pay the Estate Duty in respect of all personal property, wheresoever situate, of which the deceased was *competent to dispose* [see s. 22 (2) (a)] at his death, except [see Finance Act, 1896, s. 20 (2)] such objects of national, etc., interest as are within clause 29 above, on delivering the Inland Revenue affidavit, and may pay in like manner the Estate Duty on any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty thereon request him to make such payment. [See ss. 6 (2) and 8 (3).] The executor is not liable

Accountable persons : Executor.

for any Estate Duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received. [See s. 8 (3).] Settlement Estate Duty leviable in respect of personal property, settled by the deceased's Will, is to be collected upon an account to be delivered by the executor within six months after the death. [See Finance Act, 1896, s. 19 (2).]"

Administra-
tor.

Persons tak-
ing possession
or inter-
meddling.

Other persons
accountable.

Unless the context otherwise requires, the expression "executor" means the executor or administrator of a deceased person, and includes any person who takes possession of or intermeddles with the personal property of a deceased person. [See s. 22 (1) (d).]

"42. Where property passes on the death of the deceased, and his executor is not accountable for the Estate Duty thereon, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, is accountable for the Estate Duty on the property. [See s. 8 (4).] Such objects of national, &c., interest as are within clause 29 above are to be accounted for by the person who sells them or becomes competent to dispose of them. [See Finance Act, 1896, s. 20 (2).]"

Mode of
valuation.

Administra-
tion expenses
of property
out of the
United King-
dom.

Foreign duty.

Paragraphs 45—48 indicate how the principal value of any property is to be ascertained.

"49. Where the Commissioners are satisfied that any additional expense in administering or in realising foreign property has been incurred by reason of the property being situate out of the United Kingdom, an allowance for such expense not exceeding 5 per cent. on the value of the property is made. [See s. 7 (3).]"

"50. Where the Commissioners are satisfied that by reason of the deceased's death any duty in respect of foreign property is payable in the country where the property is situate, an

allowance of the amount of the duty is made from the value of the property. [See s. 7 (4).] "

"51. Every estate is to include all income upon the property included therein down to and outstanding at the date of the deceased's death. [See s. 6 (5).] "

Income and interest.

"52. Allowance against the gross principal value of an estate is made for reasonable funeral expenses and for debts and incumbrances (including mortgages or terminable charges [see s. 22 (1) (k)]) incurred or created by the deceased *bonâ fide* for full consideration in money or money's worth wholly for his own use and benefit, and which take effect out of his interest. [See s. 7 (1) (a).] "

Funeral expenses and debts.

"53. No allowance can be made for any debt in respect whereof there is a right to re-imbursement from any other estate or person unless such re-imbursement cannot be obtained. [See s. 7 (1) (b).] "

Debts in respect whereof re-imbursement claimable.

"54. An allowance is not made in the first instance for debts due from the deceased to persons resident out of the United Kingdom, unless contracted to be paid in the United Kingdom or charged on property situate within the United Kingdom, except out of the value of any personal property of the deceased situate out of the United Kingdom on which Estate Duty is paid. No repayment of Estate Duty is made in respect of any such debts except to the extent to which the personal property of the deceased situate out of the United Kingdom is shown to be insufficient for their payment. [See s. 7 (2).] "

Foreign debts.

"55. Where an estate includes an interest in expectancy (and this expression covers an estate in remainder or reversion, and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases [see s. 22 (1) (j)]) Estate Duty in respect of that interest is to be paid, at the option of the person accountable for the duty, either with the duty on the rest of the estate or when the interest falls into possession. [See s. 7 (6).] If the duty is not paid with the Estate Duty on the rest of the estate, then, for the purpose of determining the rate of Estate Duty in respect of the rest of the estate, the value of the interest is to

Interests in expectancy.

be its value at the date of the death of the deceased. [See s. 7 (6) (a).] The rate of Estate Duty upon the interest when it falls into possession is to be calculated according to its value at that time, together with the value of the rest of the estate as previously ascertained. [See s. 7 (6) (b).] "

When duty is due.

" 58. The duty, which is to be collected upon an Inland Revenue Affidavit or Account, is due on the delivery thereof, or at the expiration of six months from the death, whichever first happens. [See s. 6 (7).] Except in the case of such objects of national, &c., interest as are within clause 29 above, where the duty is due one month after the date of sale, or six months after their coming into possession of a person competent to dispose of them, as the case may be, or on delivery of the account, whichever first happens. [See Finance Act, 1896, s. 20 (2).] "

Payment of additional duty.

" 59. Estate Duty is, in the first instance, calculated at the appropriate rate according to the value of the estate, as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty is payable, and is treated as duty in arrear. [See s. 8 (7).] "

Interest on duty.

" 60. Simple interest at 8 per cent. per annum, without deduction for income tax, is payable upon all Estate Duty from the date of the deceased's death, or, where the duty is payable by instalments, or becomes due at any later date than six months after the death, from the date at which the first instalment or the duty becomes due, and is recoverable in the same manner as if it were part of the duty. [See Finance Act, 1896, s. 18 (1).] "

Interest on fixed duty.

" 61. When the fixed duty of 80s. or 50s. under s. 16 is paid within twelve months after the death of the deceased, interest is not charged. [See s. 16 (5).] "

Instalments on real property.

" 62. The Estate Duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest at the rate of 8 per cent. per annum from the date at which the first instalment is due, and the first instalment is to be due at the

expiration of twelve months from the death, and the interest on the unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and, in case the property is sold, is to be paid on completion of the sale, and if not so paid, is to be duty in arrear. [See s. 6 (8).] "

"68. The Estate Duty in respect of any annuity or other definite annual sum referred to in s. 2 (1) (d) of the Finance Act, 1894, may be paid by four equal yearly instalments, the first to be due twelve months after the death. Interest on the whole unpaid duty is to be added to the second and subsequent instalments. [See Finance Act, 1896, s. 16.] "

Instalments
on annuities.

Paragraph 64 indicates when a deduction may be made where colonial duty has been paid. Colonial duty.

"66. The executor of the deceased is, to the best of his knowledge and belief, to specify in appropriate accounts annexed to the Inland Revenue affidavit *all* the property in respect of which Estate Duty is payable upon the death of the deceased, whether he is or is not accountable for the duty thereon. [See s. 8 (3).] "

Executor to
disclose all
property.

"69. Penalties are provided for the wilful failure to deliver accounts or to comply with the requirements which the Commissioners are empowered to make. [See s. 8 (6) and (14).] "

Penalties.

"70. (1.) In the case of persons dying after the 1st August, 1894, and before the 19th April, 1907, the rates of Estate Duty are according to the following scale. [See s. 17.] "

Rates of
estate duty.

Principal Value of the Estate.				Rate per cent.
£		£		
Above	100	Not above	100	0
	500	but not above	500	1
"	1,000	"	1,000	2
"	10,000	"	10,000	3
"	25,000	"	25,000	4
"	50,000	"	50,000	4½
"	75,000	"	75,000	5
"	100,000	"	100,000	5½
"	150,000	"	150,000	6
"	250,000	"	250,000	6½
"	500,000	"	500,000	7
"	1,000,000	"	1,000,000	7½
"		"		8

"(2.) In the case of settled property passing on a death after the 8th April, 1900, and prior to the 19th April, 1907, where the disponent died on or before the 1st August, 1894, and such property, if he had died after that date, would have been chargeable with Estate Duty on his death, the amended law as to aggregation, stated in clause 33 (3) above, may result in the rates of duty on the settled property, treated as an "estate by itself," and on property aggregable therewith, being raised one half per cent., except in the case of the 8 per cent. rate."

"(3.) In the case of persons dying on or after the 19th April, 1907, the rates of Estate Duty are according to the following scale. [See Finance Act, 1907, s. 12, and the First Schedule to that Act.] "

Principal Value of the Estate.				Rate per cent.
Above	£	Not above	£	
	100	but not above	500	0
"	500	"	1,000	1
"	1,000	"	10,000	2
"	10,000	"	25,000	3
"	25,000	"	50,000	4
"	50,000	"	75,000	4½
"	75,000	"	100,000	5
"	100,000	"	150,000	5½
"	150,000	"	250,000	6
"	250,000	"	500,000	7
"	500,000	"	750,000	8
"	750,000	"	1,000,000	9
"	1,000,000	"	1,500,000	10
"	1,500,000	"	2,000,000	£10 on 1 million and £11 on the remainder.
"	2,000,000	"	2,500,000	£10 on 1 million and £12 on the remainder.
"	2,500,000	"	3,000,000	£10 on 1 million and £13 on the remainder.
"	3,000,000	.	.	£10 on 1 million and £14 on the remainder.
		.	.	£10 on 1 million and £15 on the remainder.

"(4.) Where an interest in expectancy in settled property has before the 19th April, 1907, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on that property is to be payable by the purchaser or mortgagee when the interest falls into possession on

a death or on or after the 19th April, 1907, than would have been payable if the scale of rates of Estate Duty set out in s. 17 of the Finance Act, 1894, had not been altered. [Finance Act, 1907, s. 12 (proviso).] "

"71. The rate of the Settlement Estate Duty is 1 per cent. [See s. 17.] "

Rate of
settlement
estate duty.

Paragraph 72 shows the adjustments to be made in determining the rate of duty in case of fractions of £100 capital, having regard to the date of death of the deceased and the value of the estate.

"73. Where the gross value of the property real and personal on which Estate Duty is payable on the death of the deceased exclusive of property settled otherwise than by the Will of the deceased exceeds £100, but does not exceed £300, a fixed duty of 30s. *may be* paid, and where it exceeds £300 but does not exceed £500, a fixed duty of 50s. *may be* paid. [See s. 16 (1).] Where the fixed duty of 30s. or 50s. has been paid, and it is afterwards discovered that the gross value of the property exceeds £500, the *ad valorem* duty according to the true value is payable, and no allowance can be made for the duty paid at first. But where 30s. has been paid and it is discovered that 50s. should have been paid, the difference only is payable. [See s. 16 (1), embodying and extending the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 35.] Where, however, the deceased died on or after the 1st September, 1903, and the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, an allowance may be made for the duty paid at first. [See Revenue Act, 1903, s. 14.] "

Estates not
above £500
gross.

"74. Where the assistance of the local Inland Revenue Officer is not required, the *ad valorem* duty according to the scale may be paid instead of the fixed duty of 30s. or 50s. [See s. 16 (2), and s. 16 (1), embodying and extending the Customs and Inland Revenue Act, 1881, s. 33.] Where the net estate is small it may be found that the *ad valorem* duty is less in amount than the fixed duty."

Option.

"75. Where the NET value of the property, real and

Exemption
from other

duties in cases
not over
£1,000 net.

personal, on which Estate Duty is payable on the death of the deceased, exclusive of property settled otherwise than by the Will, if any, of the deceased, does not exceed £1,000, and the fixed duty or *ad valorem* Estate Duty has been paid upon the principal value of that estate, the Settlement Estate Duty and the Legacy and Succession Duties are not payable under the Will or intestacy of the deceased in respect of that estate. [See s. 16 (8).] "

SECT. 2.—*Of the Affidavit for the Commissioners of Inland Revenue.*

The Inland Revenue affidavit must be in the form provided by the Commissioners under s. 29 of the Act of 1881. It is sworn in the Registry (Principal or District, as the case may be) of the Probate Division, and is to be delivered to the Probate Registrar on application for probate or letters of administration.

The forms in use for the Inland Revenue affidavit can be obtained of any collector of Inland Revenue, or by application to the Secretary, Estate Duty Office, London, W.C., or (with the exception of Form A—5) at any Money Order Post Office outside the Metropolitan postal district.

The forms in use are :—

AFFIDAVITS.

B—2. Inland Revenue Affidavit for Probate or Administration where there is *no* Settled Property, and the gross principal value of the free and other unsettled property, real and personal, in respect of which Estate Duty is leviable on the death of the deceased, does not exceed £500 (except where the *gross* value exceeds £100, but the *net* value does not exceed £100), and, if any Estate Duty is payable thereon, it is desired to pay the fixed duty of 80s. or 50s.

NOTE.—Where, in the circumstances of the case, the *ad valorem* duty in respect of the *net* Estate is less than the fixed duty [see clauses 70 and 72], and it is desired to pay the smaller duty, the Form A—3, A—4, or A—5, which—

ever is appropriate, should be used, and not the Form B—2.

- B—3. Inland Revenue Affidavit for Probate or Administration, similar to B—2, but to be used where there is Settled Property in addition.
- No. 24. Summary of Duty and Interest: To accompany Form B—3.
- A—4. Inland Revenue Affidavit for Probate or Administration, where the property in respect of which Estate Duty is payable on the death of the deceased consists *exclusively of FREE personal property situate in the United Kingdom, and passing under the deceased's will or intestacy; except where the net value exceeds £100, but the gross value does not exceed £500, and the fixed duty of 30s. or 50s. is to be paid.*
- No. 16. Summary of Duty and Interest: To accompany Form A—4.
- A—6. Inland Revenue Affidavit for Probate or Administration, where the property in respect of which Estate Duty is payable on the death of the deceased consists *exclusively of FREE personal AND REAL property situate in the United Kingdom, and passing under the deceased's will or intestacy; except where the net value exceeds £100, but the gross value does not exceed £500, and the fixed duty of 30s. or 50s. is to be paid.*
- No. 17. Summary of Duty and Interest: To accompany Form A—6.
- A—5. Inland Revenue Affidavit for second or subsequent grants, where the property was within the operation of a prior grant. Where it was not so, the same form as for an original grant should be used.
- A—8. Inland Revenue Affidavit for Probate or Administration, except where B—2, B—3, A—4, A—6, or A—5, is applicable.
- No. 15. Summary of Duty and Interest: To accompany Form A—3.
- D—1. (In duplicate.) Corrective Affidavit.

ACCOUNTS :—

C—1. (In duplicate.) Account of property which passed on the death, but the Estate Duty whereon was not paid on the Inland Revenue Affidavit.

C—2. (In duplicate.) Account for Settlement Estate Duty.

C—3. Account for instalments of Estate Duty and Settlement Estate Duty.

D—2. (In duplicate.) Corrective Account.

Form A—3, used in all cases for original grants, requires a statement of the following particulars :—

Death and
domicil.

(1) The death and domicil of the deceased.

Family.

(2) The family of deceased.

Personal pro-
perty situate
within the
United King-
dom.

(3) A true account of the particulars and value as at the date of the deceased's death of all the personal estate of the deceased; whether in possession or reversion, within the United Kingdom, including personal property over which the deceased had exercised by Will an absolute power of appointment.

Personal or moveable property situate abroad saleable or transferable in the United Kingdom should be included in the above statement as "Personal property situate in the United Kingdom."

Foreign government and railway bonds payable to bearer and marketable on the Stock Exchange, when physically situate in the United Kingdom at the death of the testator or intestate, are liable to Estate Duty even though the deceased was not a domiciled Englishman (aa).

Debts owing
within the
United King-
dom.

(4) A true and particular list of debts owing at the time of the deceased's death to persons resident within, or contracted to be paid in, or charged on property within the United Kingdom.

Value of
personal pro-
perty.

(5) The value of the personal property after deducting the aggregate amount of debts and funeral expenses.

Particulars
and value of
real property
situate in
England.

(6) A true account of the particulars and value, as at the date of the deceased's death, of all the real property situate in England vested in the deceased without a right in any other person to take by survivorship, including real property over which the deceased executed by Will a general power of

(aa) *Winans v. The King*, [1906] 1 K. B. 1022.

appointment, but exclusive of land of copyhold tenure or customary freehold where an admission or act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(7) The aggregate gross value of the estate which by law devolves to and vests in the personal representative for or in respect of which the grant is to be made.

Gross value of the estate.

(8) A true account of the particulars and gross value, as at the date of the deceased's death, of all the personal or moveable property of the deceased, whether in possession or reversion, situate out of the United Kingdom, including personal or moveable property over which the deceased had and exercised by Will an absolute power of appointment.

Personal or moveable property situate out of the United Kingdom.

(9) A true and particular list of debts owing to persons resident out of the United Kingdom, other than debts included in (4), *ante*, also a statement of the amount of any duty payable in any foreign country in respect of foreign assets.

Debts owing out of the United Kingdom.

Immoveable property situate out of the United Kingdom is not chargeable with Estate Duty; and if the deceased died domiciled out of the United Kingdom no duty is payable in respect of the personal or moveable property situate out of the United Kingdom, and paragraphs (8) and (9) are then omitted from the affidavit (b).

Immoveable property situate out of the United Kingdom.

Where a beneficiary died who was entitled under the Will of an English testator to a share of the proceeds of sale of a foreign tea estate given to English trustees upon trust for sale, with power to postpone sale and to manage and work the same, such share was held to be an English chose in action in respect of which Succession Duty, Estate Duty, and Settlement Estate Duty were payable (c).

The share of a deceased partner is situate where the business was carried on at the time of his death (d).

(b) See s. 2 (2) of the Finance Act, 1894, and Williams (10th ed.) 1742.

K. B. 885.

(d) Stamp Duties Commissioners v. Salting, [1907] A. C. 449.

(c) Att.-Gen. v. Johnson, [1907] 2

Debts otherwise secured.

(10) A statement that the debts are not such as are primarily payable out of any real property or debts in respect whereof there is a right to reimbursement and can be obtained from any other property or person.

A debt for payment out of which the deceased was surety only must not be deducted unless the executor has already paid it.

Other property of which deceased was competent to but did not dispose of.

(11) Any other personal property of which the deceased was at the time of his death competent to dispose within the meaning of the Finance Act, 1894, but of which he did not dispose.

General power to charge money.

(12) Particulars of any general power to charge money on real property.

This does not refer to the deceased's power in right of ownership to charge money on his own real property.

Where amount or value unascertained. Other property.

(18) An undertaking to bring in an account of any property where the amount or value has not been ascertained.

(14) Particulars of any other property beyond that already referred to in respect of which Estate Duty is payable on the death of the deceased.

Gifts *inter vivos*.

Inter vivos gifts within a year of death are property deemed to pass on the death.

Election as to immediate or deferred payment.

(15) A statement whether the representative elects to pay at once the whole of the Estate Duty on real property or other property in respect of which he has the right to defer payment under the Act.

Particulars of charges on leaseholds and real property.

(16) A true and particular list of charges at the deceased's death on leaseholds and on real property comprised in the above statements.

(17) A statement how the same were created and whether they are primarily chargeable upon any other property, and whether there is a right of reimbursement capable of being obtained from any other property or person.

Amount of colonial duty to be deducted.

Relates to the amount of duty (if any) payable in a British possession to which s. 20 of the Act of 1894 applies in respect of any property situate in such possession and which may be deducted from the Estate Duty payable in respect of the same property.

(19) Relates to the amount of duty (if any) which may be deducted as having been paid or payable under the Act of 1881.

Corrective affidavits for Inland Revenue are required not only to correct errors in first affidavit, but also where the value at the time of the first affidavit cannot be conveniently ascertained. Corrective affidavit.

The form of corrective affidavit may be filled in and sent in unsworn in the first instance, and the commissioners may dispense with an oath in corrections of Estate Duty.

Sect. 11 of the Finance Act, 1894, provides as follows :— Certificate of discharge for Estate Duty.

“(1) The commissioners on being satisfied that the full Estate Duty has been or will be paid in respect of an estate or any part thereof shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for Estate Duty the property shown by the certificate to form the estate or part thereof, as the case may be.

“(2) Where a person accountable for the Estate Duty in respect of any property passing on a death applies after the lapse of two years from such death to the commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the commissioners may determine the rate of the Estate Duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for Estate Duty, and the commissioners shall give a certificate of such discharge.

“(3) A certificate of the commissioners under this section shall not discharge any person or property from Estate Duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be

payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for.

"(4) Provided nevertheless that a certificate purporting to be a discharge of the whole Estate Duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty notwithstanding any such fraud or failure."

SECT. 8.—Of Legacy and Succession Duties.

How affected
by domicile of
testator

Personal property follows the person and is to be considered as situate wherever the domicile of the proprietor is; consequently if the deceased, whether a British subject or a foreigner, dies domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate and liable to the duties imposed by the statutes on legacies and successions; and on the other hand, if he dies domiciled abroad his personal property is exempt from these duties (*e*). This rule applies to a legacy given in exercise of a power by a testator domiciled out of England, but it is different as to Succession Duty on a devolution of personal property under an English instrument in pursuance of a testamentary appointment; the duty in that case being payable notwithstanding the appointor was domiciled abroad (*f*).

Instructions as to Legacy and Succession Duties on property passing at the deaths of persons dying after the 1st August, 1894, are issued by the Commissioners of Inland Revenue, and they are embodied in the following summary, which contains additional observations and references, the instructions being enclosed in inverted commas.

Legacy Duty.

"Legacy Duty is payable in respect of any gift" (specific or pecuniary) "by Will which shall be satisfied out of the personal property of the deceased, or out of the personal

(*e*) Williams (10th ed.) 1850; and *ante*, p. 150. As to Estate Duty, see *ante*, pp. 164, 175.

(*f*) Williams (10th ed.) 1851 *et seq.* and cases there cited, and see *ante*, p. 158.

property which the deceased shall have had power to dispose of as he or she shall think fit, whether the same be given by way of annuity, or in any other form, and in respect of every gift which shall take effect as a donation *mortis causa* " (g).

Legacy Duty is not to be paid on any articles of plate, furniture, or other things not yielding any income and given to different persons in succession, whilst enjoyed in kind only by any persons not having any power of selling or disposing thereof (h).

" No person is to pay a legacy without taking a receipt for the same, expressing the date of the receipt, the name of the testator, the name of the person to whom the receipt is given, and of the person to whom the legacy is bequeathed, the amount or value of the legacy, and the amount and rate of the duty payable thereon " (i).

Receipts to be taken.

" The duties on legacies are to be accounted for at the time of paying, delivering, or otherwise discharging the legacies; but if by reason of infancy, or the absence of the legatees, or any other cause, the legacies cannot be paid, but are retained for the use of the legatees, the payment of the duties is not to be deferred till such legacies are actually paid, but the duties are to be accounted for when the legacies are so retained."

When duties are to be paid.

" A legacy payable to a legatee on his attaining the age of twenty-one years, or at some other future period, the interest of which is directed by the Will to be applied for the benefit of such legatee until the legacy becomes payable, being a vested legacy, the duty is payable on the amount or value of such legacy immediately, as a *retainer* of the legacy in trust for the use of the legatee, and the office form for the payment of the duty is to be filled up and signed."

Legacy to an infant.

" The value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, must be ascertained by the tables annexed to the 16 & 17 Vict. c. 51, and the duty is to

How annuities are to be valued.

(g) See 36 Geo. III. c. 52, s. 7; 55 Geo. III. c. 184; Williams (10th ed.) 1770.

(h) 36 Geo. III. c. 52, s. 14.

(i) *Ibid.*, s. 27, and see *post*, p. 191.

be paid on such value by equal instalments out of the first four annual payments of the annuity" (k).

Legacy to
different
persons in
succession.

"Any legacy or residue given to different persons in succession, liable to the *same* rate of duty, is to be charged with duty on the amount thereof, as in the case of a legacy to one person. And if any legacy or residue be given to different persons in succession, liable to *different* rates of duty, they who take for life only or other temporary interest, are to pay as annuitants; and when any person or persons shall become entitled to the principal, or when upon the death of a tenant for life all the remaining persons in the succession shall be liable to the *same* rate of duty, then the duty must be paid upon the *principal*, as if the same had come to them immediately on the death of the testator" (l).

Legacy sub-
ject to contin-
gency which
may defeat
gift.

"A legacy given subject to any contingency which may defeat the gift, is nevertheless to be charged with duty as an *absolute bequest*, and the duty is to be paid out of the capital of such legacy; and should the contingency afterwards happen, and the legacy go to one liable to a higher rate of duty, such legatee is to pay the difference" (m).

Residue.

Legacy Duty is payable on the clear residue (when devolving to one person) and on every share of the clear residue (when devolving to two or more persons) of the personal estate (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy (n).

How to
account for
residue.

"For the payment of the duty on the residue, a statement of the deceased's personal estate and the moneys arising from the sale or mortgage of real estate, or the value of the real estate if not sold, when the same is directed by the Will or codicil to be sold or mortgaged, and of all payments

(k) 36 Geo. III. c. 52, ss. 8—10;
Williams (10th ed.) 1771.

(l) *Ibid.* ss. 12—16; Williams (10th
ed.) 1773 *et seq.*

(m) Sect. 17.

(n) 55 Geo. III. c. 184; Williams
(10th ed.) 1765.

made thereout, is to be rendered on the office printed Residuary Form No. 8, together with a *duplicate* thereof, and the duty when assessed on the amount or value of the clear residue must be paid *within fourteen days* after such assessment *under a penalty of treble the value of the duty.*"

For obvious reasons the Acts do not specify any time within which the Residuary Account is to be rendered.

"It having been determined by the Court of Exchequer that the Legacy Duty is chargeable upon the amount or value of the property as it stands *with its accretions of income* at the time when the duty is computed, and *not as the property stood at the time of the death of the deceased*, it follows, that in rendering an account, all investments which shall have been made of any part of the deceased's personal estate, and all dividends, interest, and profits arising from the personal estate of the deceased, subsequent to the time of the deceased's death, and all accretions thereof down to the time of the computation of the duty thereon, *must be considered as part of the deceased's personal estate*, and be accounted for accordingly."

Rents, dividends, &c. to be accounted for until duty is computed.

But where by Will a specific debt is forgiven, which is known and ascertained at the time of the testator's death, Legacy Duty is not payable upon the interest accruing in respect of such debt between the time of such death and the period when the executors close their accounts (o).

"Effects, not consisting of money or securities for money, and not sold, are to be valued at the time the account is rendered; when inventories and proper valuations thereof will be required to be produced."

When and how effects to be valued.

"Where the residue of the personal estate is given to one for life, and afterwards to others, a distinct account must be given of the rents, dividends and interest accrued subsequent to the death of the testator, and of the payments thereout for interest of legacies, and for interest of the testator's debts, accrued after his decease, so that the balance due to the residuary legatee for life may be clearly ascertained, and the proper duty charged thereon."

Where residue is given for life distinct account to be kept of rents, dividends, &c.

(o) See Williams (10th ed.) 1832.

No legacy specifically bequeathed to be included in the residue without giving notice.

"If any legacy specifically bequeathed shall be included in the account of residue by reason of the same being given to the residuary legatee, or of the person entitled to the legacy and the residuary legatee being liable to the *same* rate of duty, *it will be necessary*, in order that such legacy may be discharged in the books of the Estate Duty Office, and *to prevent the executors from being afterwards called upon to account for the duty on such legacy*, to attach a note to the residuary statement describing the legacy and stating the same to be included in the account."

Money left to pay duty.

Money left to pay Legacy Duty, so that the legatee may take the legacy free of duty, is not chargeable with Legacy Duty (*p*).

Legacies to bodies corporate to be preserved.

Legacies of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, to any body corporate or to any of the Inns of Court, or any endowed school, to be kept and preserved and not for the purposes of sale, are not liable to Legacy Duty (*q*).

Succession Duty.

Legacies charged on real property in aid of personal property.

"Where real property is charged in aid of personal property with the payment of pecuniary legacies, Succession Duty is to be paid on such proportion of the legacies as falls to be satisfied out of the real property so charged."

As to persons dying on or after the 1st July, 1888, legacies payable out of or charged upon real estate, or the proceeds thereof, are not chargeable with Legacy Duty but with Succession Duty (*r*).

Money payable by devise as a condition or by way of election.

Although where under the doctrine of election a legatee surrenders his own property Legacy Duty is not payable on the personal property of the legatee so given up, yet where a testator devises his own real estate to A. and bequeaths A.'s personal estate to B., formerly Legacy Duty, and now Succession Duty, is payable on the value of the personal estate so charged

(*p*) 36 Geo. III. c. 52, s. 21.

(*q*) 39 Geo. III. c. 73; and see Finance Act, 1894, s. 15, as to power

to remit Estate Duty.

(*r*) 51 & 52 Vict. c. 8, s. 21 (*r*).

on the testator's real estate (*s*). The same principle applies and duty is payable where a sum of money is to be paid by a devisee to a legatee as a condition of the devise (*t*).

Leasehold property is chargeable with Succession Duty as real property under the Succession Duty Act, instead of with Legacy Duty (*u*).

"The term 'real property' includes all freehold, copyhold, customary, leasehold, and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland (except money secured on heritable property in Scotland), and all estates in any such hereditaments" (*x*).

"The term 'personal property' does not include leaseholds, but includes money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property" (*y*).

"The term 'property' alone includes real property and personal property" (*z*).

"The term 'trustee' includes an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust.

The term 'succession' denotes any property chargeable with duty under the Act 16 & 17 Vict. c. 51" (*a*).

"Every disposition of property, by reason whereof any person becomes beneficially entitled to any property, or the income thereof, upon the death of the deceased, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of the deceased, to any other person, in possession or expectancy, is deemed to confer on the person entitled by reason

(*s*) *Laurie v. Clutton*, (1851) 15 B. 131.

(*t*) *Att.-Gen. v. Wyndham*, (1862) 1 Hurl. & C. 571; and see *Williams* (10th ed.) 1838, n. (*v*).

(*u*) 16 & 17 Vict. c. 51, ss. 1, 19.

(*x*) *Ibid.*, s. 1.

(*y*) *Ibid.*

(*z*) *Ibid.*

(*a*) *Ibid.*

"Real property."

"Personal property."

"Property."

"Trustee."

"Succession."

What dispositions and devolutions of property confer successions.

of any such disposition, or devolution, a 'succession': and the term 'successor' denotes the person so entitled: and the term 'predecessor' denotes the settlor, disponent, testator, obligor, ancestor, or other person, from whom the interest of the successor is or shall be derived" (b).

Joint tenants. "Joint tenants, taking by survivorship, are deemed successors" (c).

Powers. "Powers of appointment, when executed, confer successions" (d).

Dower and other charges. "Extinctions of determinable charges, such as dower, widow's jointure, rentcharges, annuities, and other charges, whether of income or principal, confer successions" (e).

Reservation of any benefit. "Dispositions, accompanied by the reservation of a benefit to the maker, confer successions" (f).

Secret trusts or other evasions. "Dispositions to take effect at periods dependent on death, or made with an engagement, secret trust, or arrangement, or made for evading duty, confer successions" (g).

Alienation or sale of reversions. "If reversionary property, expectant upon death, be vested by alienation, or other derivative title, in any person other than the person originally entitled under the before-mentioned dispositions or devolutions, the Succession Duty is to be payable at the same rate and time as if no such alienation had been made, or derivative title created" (h).

Proceeds of sale of real property. "Succession Duty is payable in respect of successions to real and personal property passing upon the death of the deceased, and in respect of charges on real property made by the deceased, whether in exercise of any power or otherwise, and on the proceeds of sale, or principal value of real property directed to be sold by the Will of the deceased, or sold under a power contained in such Will, whether given by way of annuity or in any other form" (i).

Duty a first charge. "The duty on a succession to real or leasehold property

(b) Sect. 2.

(c) Sect. 3.

(d) Sect. 4.

(e) Sect. 5.

(f) Sect. 7.

(g) Sect. 8, but see *post*, p. 190 as to

the rate of duty where there is a secret trust.

(h) Sect. 13, and see Williams (10th ed.) 1809.

(i) Sect. 4, and see Williams (10th ed.) 1794, 1802.

is a first charge on the interest of the successor in the property; and the successor and trustee, &c., are accountable for its payment" (k).

"The duties on successions to personal property, charges on real property, and to money from the sale of real property under any trust for sale, are to be paid in the same manner as the duties on legacies."

Mode of payment.

"Where the successor is *competent to dispose of* the real property comprised in his succession, within the meaning of s. 22 (2) (a) of 57 & 58 Vict. c. 30, the value for the purpose of Succession Duty is the principal value of the property, after deducting the Estate Duty payable in respect thereof on the said death and the expenses, if any, properly incurred of raising and paying the same, and the duty is a charge thereon, and is payable by the same instalments as Estate Duty on real property, with interest at the rate of 3 per cent. per annum, from the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profit thereof. The principal value is to be ascertained in the same way as for Estate Duty. See the Form A—2 issued to the executor with the Form of Inland Revenue affidavit."

Real property which successor is competent to dispose of.

"By s. 22 (2) (a) of the same Act a person shall be deemed *competent to dispose of* property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the owner or other holder thereof to appoint or dispose of property, as he thinks fit, whether exercisable by instrument *inter vivos* or by Will or both."

"Where the successor is *not competent to dispose of* the real property comprised in his succession within the meaning of 57 & 58 Vict. c. 30 his interest is considered as an annuity, equal to the annual value for his life or for any lesser period during which he shall be entitled thereto, and the value of

Real property which successor is *not* competent to dispose of.

such annuity is calculated by the tables annexed to the Succession Duty Act, and the duty chargeable thereon is payable by eight equal half-yearly instalments, the first to be paid twelve months next after the successor shall have become entitled to the beneficial enjoyment, and the seven following instalments at half-yearly intervals of six months each, from the day when the first instalment becomes due, or at the option of the successor, by two equal moieties, whereof the first moiety shall be paid by four equal yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the three following instalments at yearly intervals to be computed from the day on which the first instalment shall have become payable; and the second moiety shall be paid on the day for payment of the last instalment of the first moiety, or, if not so paid, shall be payable by four equal yearly instalments, with interest at the rate of three pounds per centum per annum from such last-mentioned day on so much of the second moiety as shall for the time being remain unpaid, the first of such instalments, with the interest, to be paid at the expiration of twelve months from that day."

Instalments
unpaid at
death of
successor.

"If a successor, not competent to dispose by Will of a continuing interest in the property, die before all the eight half-yearly instalments be due, the remaining payments cease; or, in the event of his exercising his option to pay by two equal moieties, and dying before the day for payment of the last instalment of the first moiety of duty, the duty is reduced by so much as would have ceased to be payable if the duty had been payable by eight half-yearly instalments" (l).

"But in the case of a successor who shall have been competent to dispose by Will of a continuing interest in the property, the instalments of duty unpaid at his death do not cease to be payable" (m).

All necessary
out-goings to
be deducted.

"In estimating the annual value of lands used for agricul-

(l) Sect. 21; 51 Vict. c. 8, s. 22.

(m) 57 & 58 Vict. c. 30, s. 18.

tural purposes, houses, buildings, tithes, teinds, rentcharges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance will be made of all necessary out-goings" (n).

"The Succession Duty for timber (not being coppice or underwood, yielding profit yearly), is, where the duty is not payable upon the principal value, to be paid upon sales exceeding £10 yearly. The whole duty may be commuted" (o). Timber.

Duty is only chargeable under s. 28 in respect of timber sold, and does not attach to growing trees sold with the property. It does not extend to the sale moneys of timber from trees which were not growing upon the property when the successor became beneficially entitled in possession.

"The Succession Duty on advowsons, when sold, is payable on the purchase money" (p). Advowsons.

"Where property is subject to lease, and a further lease is made, Succession Duty is payable on fine, &c" (q). Fines on renewals of leases, &c.

"The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income, is to be calculated upon an average of past profits or income as shall be agreed upon; but where the circumstances do not admit of such agreement recourse is to be had to a per-centage upon the saleable value" (r). Manors, mines, and other fluctuating incomes.

"Sums charged on real property, and money from the sale of real property under any trust for sale, are chargeable with duty as successions to personal property" (s). Charges on real property and money from the sale thereof.

"The regulations for the payment of duty on legacies apply to successions to personal property."

"No allowance is to be taken for any incumbrance created or incurred by the successor, but allowance may be taken for all other incumbrances. Against real property, only the annual interest of the incumbrance is to be deducted" (t). Allowance of incumbrances.

"Where the Succession Duty is payable upon the principal

(n) 16 & 17 Vict. c. 51, s. 22.

(o) Sect. 23.

(p) Sect. 24.

(q) Sect. 25.

(r) Sect. 26.

(s) Sect. 29.

(t) Sects. 34, 35.

value, the capital of the incumbrances, including the capitalised value of terminable charges, can be deducted."

Trustees, &c.
to make
returns and
deliver
accounts of
property.

"Accountable persons are to give notice of successions to the Commissioners of Inland Revenue or their officers, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of personal property or any part thereof, to or for the successor or any person in his right; and in the case of real property when duty shall first become payable; and deliver a full and true account of the property, for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed, together with the names of the successor and predecessor and their relation to each other, and all such other particulars as shall be necessary or proper to ascertain the duties fully and correctly" (u).

Penalty.

"The penalty for not giving notice or delivering an account, is, for every month of delay, £10 per cent. upon duty calculated as if payable at the rate of £1 per cent" (v).

How forms
can be
obtained and
duties be
paid.

"All Legacy and Succession Duties can be paid personally, or by an agent, at the Estate Duty Office, Somerset House, where also the proper forms can be obtained."

"Executors, trustees, or their agents residing in the country, will be supplied with the necessary forms on applying to the Collector of Inland Revenue, or at any Post Office issuing money orders. When the forms are properly filled up they should be transmitted by post, addressed 'The Secretary, Estate Duty Office, Somerset House, London, W.C.,' for examination, and when the receipts and accounts are found to be correct, instructions for the payment of the duty will be given."

The Forms in use are:—

(Legacy Duty.)

No. 1.—For specific and pecuniary legacies. For shares of residue, where the amount of the residue has been arrived at by a general account on the Form No. 3, and (in duplicate) for an account supplemental to that account.

(u) Sect. 45.

(v) Sect. 46.

No. 2.—For instalments of Legacy Duty on annuities.

No. 8.—(In duplicate.)—For general residuary accounts.

(*Succession Duty.*)

No. 1.—For pecuniary legacies.

No. 4.—(In duplicate.)—For personal property (including settled funds, money charged upon or arising from the sale of real property, and the proceeds of sale of church patronage) where the property is at once taken absolutely, or by different persons in succession, all liable to duty at the same rate, and the duty is chargeable upon the capital.

No. 5.—(In duplicate.)—For personal property chargeable by way of annuity, including annuities charged upon real estate.

No. 6.—(In duplicate.)—For real property, including leaseholds, taken for life.

No. 6-1.—(In duplicate.)—For real property, including leaseholds, where the successor is competent to dispose of the property within the meaning of 57 & 58 Vict. c. 80.

No. 7.—For the second and subsequent instalments of Succession Duty on real and personal property (to follow the Form No. 6).

No. 7-1.—Ditto (to follow the Form No. 6-1).

No. 8.—(In duplicate.)—For the proceeds of sale or principal value of real property directed to be sold or sold under a power.

No. 9.—(In duplicate.)—For the cesser of terminable charges upon real property where the successor is not "*competent to dispose.*"

No. 10.—(In duplicate.)—For the proceeds of sale of timber.

Rates of Duty payable on Legacies, Annuities, and Residues.

"Every pecuniary legacy or residue, or share of residue, although not of the amount or value of £20, is chargeable

with duty by the 44 Vict. cap. 12, sec. 42. Where the whole of the personal property does not amount to £100 no Legacy Duty is chargeable (48 Vict. cap. 14, sec. 18.)."

Rate of duty.

The following are the rates of duty and in filling up the legacy receipts, and the declaration in the residuary account, the consanguinity or description of the legatee or annuitant *must be* in the following words of the Act:—

Brothers and sisters of the deceased, or their descendants ...	£3 per cent.
Brothers and sisters of the father or mother of the deceased, or their descendants ...	£5 per cent.
Brothers and sisters of a grandfather or grandmother of the deceased, or their descendants ...	£6 per cent.
Persons in any other degree of collateral consanguinity, or strangers in blood to the deceased ...	£10 per cent.

Husband or wife of deceased or of legatee.

"The husband or wife of the deceased is not chargeable with duty. A legatee, whose husband or wife is of nearer relationship to the deceased, is chargeable with duty at the rate at which such husband or wife would be chargeable. Relations of the husband or wife of the deceased are chargeable with duty at £10 per cent. unless themselves related in blood to the deceased."

Title under a secret trust.

It is material to point out that where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the Will, and which cannot be correctly termed testamentary (*rr*). The rate of duty depends on the consanguinity of the legatee, therefore by such a secret trust, or personal confidence, the parties may escape from payment of duty altogether, or very nearly so, by a testator giving the property to his wife (in which case there is no duty payable) or to a child (in which case the duty is only 1 per cent.), although it may really be intended to give it to strangers in blood (*x*).

(*rr*) Cullen v. Att.-Gen., (1866) L. R. 1 H. L. 190, per Ld. Westbury.

(*x*) *Ibid.*, see per Ld. Cranworth.

"Persons paying or receiving any legacy, residue or share of residue liable to duty, without taking or signing the proper receipt for the same, will be subject to a penalty of £10 per cent. on the amount or value of such legacy, residue, or share of residue" (y). Penalties.

"Every legacy receipt must be dated on the day of signing, and the duty thereon paid within twenty-one days from the date thereof, under a penalty of £10 per cent. on the amount of the duty; and if the duty shall not be paid within three months from the date of the receipt, a penalty will then be incurred of £10 per cent. on the amount or value of the legacy" (z).

"The Commissioners of Inland Revenue cannot under any circumstances stamp a receipt on which the duty shall not be paid within twenty-one days from the date, unless the penalty incurred be also paid" (a).

Rates of Duty payable on Successions to Real and Personal Property, Charges on Real Property, and Money derived from the Sale of Real Property.

"Every succession, although the value thereof shall be less than £20, is chargeable with duty by 52 Vict. c. 7, s. 10 (2)."

"Where the whole succession or successions derived from the same predecessor upon any death shall not amount in money or principal value to £100 no Succession Duty is chargeable (16 & 17 Vict. c. 51, s. 18.)."

The following are the rates of duty and in filling up accounts the consanguinity or description of the successors Rate of duty. must be in the following words of the Act:—

Brothers and sisters of the predecessor or their descendants ...	£3 per cent.
Brothers and sisters of the father or mother of the predecessor or their descendants ...	£5 per cent.
Brothers and sisters of a grandfather or grandmother of the predecessor or their descendants ...	£6 per cent.
Persons of more remote consanguinity or strangers in blood ...	£10 per cent.

(y) 36 Geo. III. c. 52, s. 28, and see ante, p. 179.

(z) Sect. 29.

(a) Sect. 30.

Husband or wife of predecessor or of successor.

"The husband or wife of the predecessor is not chargeable with duty; and a successor, whose husband or wife is of nearer relationship to the predecessor, is chargeable with duty at the rate at which such husband or wife would be chargeable. The relations of the husband or wife of the predecessor are chargeable with duty at £10 per cent., unless themselves related in blood to the predecessor."

Lineal issue and lineal ancestors.

"Lineal issue and lineal ancestors of the predecessor are exempt from the 1 per cent. Legacy or Succession Duty, which would otherwise be chargeable, where the property passes under the deceased's Will or intestacy or under his disposition or any devolution from him, or under any other disposition, under which respectively Estate Duty under 57 & 58 Vict. c. 80 has been paid."

Net value not exceeding £1,000.

"When the net value of the property, real and personal, in respect of which Estate Duty under 57 & 58 Vict. c. 80 is payable on the death of the deceased, exclusive of property settled otherwise than by the Will of the deceased, does not exceed £1,000, and the Estate Duty thereon has been properly paid, no Legacy or Succession Duty is payable under the Will or intestacy of the deceased in respect thereof."

How duty to be paid.

"Money should not be remitted until the proper accounts have been delivered by the parties, and the amount payable and the mode of payment have been notified to them."

"The liability to account for and pay duty in no way depends upon application being made by the commissioners."

Interest on duty in arrear.

"Interest, at the rate of £3 per cent. per annum, must be added on all duties in arrear. (59 & 60 Vict. c. 28, s. 18.)"

Certificate of discharge from liability to legacy or succession duty on distribution of a fund.

Sect. 12 of 48 Vict. c. 14 provides that "When an executor, administrator or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to Legacy Duty or Succession Duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made

by the commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund. Such certificate shall not in any way affect the liability of any person other than the person in whose favour it is expressed to be given."

Sect. 14 of 52 & 53 Vict. c. 7, provides that "No person shall under a testamentary document admitted to probate, or under letters of administration, or under a confirmation, be liable for payment of any Legacy or Succession Duty, or duty imposed by this Act, after the expiration of six years from the date of the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true account and contained all the facts material to be known by the Commissioners of Inland Revenue for the ascertainment of the rate and amount of duty; and no trustee, executor, or administrator shall, after the expiration of such six years, be liable to such duty if it is proved to the satisfaction of the commissioners that the account rendered was correct to the best of his knowledge, information, and belief."

No liability after 6 years from settlement of account.

All information furnished to the commissioners for revenue purposes is confidential. Copies of affidavits or accounts are supplied to the parties who delivered them, or to their solicitors applying on their behalf, but not to other persons without the written consent of such parties, or, if they are dead, the written consent of their legal personal representatives(b).

Disclosure of contents of affidavits and accounts.

The practice of the commissioners is to decline to produce documents relating to revenue matters on subpœna unless the judge at the trial should think any particular document ought, in the interest of justice, to be produced (c).

Production on subpœna of documents.

The commissioners may refuse to produce documents on the ground that to do so would be prejudicial to the public service(d).

(b) Williams (10th ed.) 1762.

(c) *Ibid.*

(d) Brown's Trustees v. Inland

Revenue, (1897) 35 Sc. L. R. 340;
3 Tax. Cas. 598.

CANADIAN NOTES.

Legacies.

Executors should deduct the succession duty payable in respect of pecuniary legacies, before paying the amounts over to the legatees, and executors have no right to pay the duty out of the residue left after paying the legacies in full. *Kennedy v. Protestant Orphans' Home* (1894), 25 O.R. 235; *Manning v. Robinson* (1898), 29 O.R. 484. See *Re Botsford's Will* (1895), 33 N.B.R. 55; *Ross v. The Queen* (1900), 32 O.R. 143.

Effect of power of appointment.

B. by his last will directed trustees to invest a portion of his estate and pay the income arising therefrom to his brother C. and at their discretion to pay C. a portion of the principal, and after the death of C., to pay the principal remaining to such uses and purposes as C. should by deed or will appoint. B. died in 1891, four years before the passage of the Succession Duty Act. C. died in 1897, having exercised his power of appointment by will made in June, 1897. It was held that the fund in question did not pass within the meaning of the Act by the exercise of the power of appointment by C., the appointees taking under the instrument creating the power, and not by virtue of the power itself. It was also held that the Act must be construed as applying only to deaths occurring after its passage. *Atty.-Genl. v. Parker* (1898), 31 N.S.R. 202.

Where the aggregate value of the property exceeds \$200,000, only the excess over that amount is subject to a duty at the rate of 5 per cent. under section 4 of the British Columbia Act. *Re Todd, Todd v. Todd* (1900), 7 B.C.R. 115.

Insurance policy not within province.

Where the deceased died domiciled within the province, the proceeds of a life policy payable at death, without the province, are not liable, in the hands of a beneficiary domiciled in the province to succession duty. The Act aims at property having an actual situation within the province, and not to property which can only be deemed to be situate

within the province by legal fiction. *In re Templeton* (1898), 6 B.C.R. 180.

A direction that a sum of money be payable yearly to a legatee, or that interest be allowed, until the specific legacy is paid in full does not disclose an intention that such legacy is to be paid free from succession duty. *Re Botsford's Will*, (1898), 33 N.B.R. 55.

If a non-resident deceased dies leaving a debt or chose in action as part of his property the residence of the debtor fixes the *situs* of the debt. All property which can only be administered in Ontario is property situate within Ontario. *Atty.-Genl. v. Newman*, 31 O.R. 340. See *Irwin v. Bank of Montreal* (1876), 38 U.C.R. 375.

The succession duty payable under the British Columbia Act, R.S.B.C. 1897, c. 175, in respect of the real estate of a deceased person does not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will. *Re Watkins* (1906), 12 B.C.R. 97.

Succession
duty not
part of
testamentary
expenses.

Succession duties are not included under the word "expenses" in a will. *Re Meudell* (1908), 11 O.W.R. 1093.

Succession duties do not come within the description either of a debt or part of the testamentary expenses, and specific legacies, where not specially exonerated by the will, are not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees. *Re Bolster* (1905), 10 O.L.R. 591. See also *Re Holland* (1902), 3 O.L.R. 406; *Manning v. Robinson* (1898), 29 O.R. 483, and *Re Mackey* (1903), 6 O.L.R. 292.

Where a sum of money passed from the intestate to the hands of the niece of the intestate by virtue of an agreement between them, given effect to by a *donatio mortis causa*, it was held that the sum was not dutiable, the transfer not being a voluntary one but made in pursuance of a contractual obligation for value. *Atty.-Genl. for Ontario v. Brown* (1903), 5 O.L.R. 167.

Transfer
not
voluntary.

193c

EXECUTORS.

Income.

Where there is a plainly marked out period in the future when the corpus of the estate is to be divided, with a prior interest for life or years according to the event in fact, during which the trustee standing in *loco parentis* was entitled to the present income of the property until the time arrived for the division of the corpus, the income only is presently liable to the payment of succession duty. *Atty.-Genl. for Ontario v. The Toronto General Trusts Corporation*, 5 O.L.R. 216.

Costs
against
Crown.

Where an estate had paid or was ready to pay all the duties which could properly be claimed against it, the estate was held entitled to costs against the Crown of opposing a claim for higher duties. *Atty.-Genl. v. Toronto General Trusts Corporation*, 5 O.L.R. 607; *Lovitt v. Atty.-Genl. of Nova Scotia* (1903), 33 S.C.R. 350.

Proceeds of
debentures
liable.

Where debentures are by statute not liable to taxation and the testator, after making certain bequests, directed that the residue of his property, which included some of these debentures should be converted into money to be invested by the executors and held on certain specified trusts it was held that although the debentures themselves were not liable to the duty, the proceeds of their sale when passing to legatees were. *Lovitt v. Atty.-Genl. for Nova Scotia*, 33 S.C.R. 350.

"Aggregate
value."

In order to arrive at the aggregate value of the property of a deceased person under the Succession Duty Act, 1896, the debts due by the estate should be deducted. *Receiver-General of New Brunswick v. Hayward* (1901), 35 N.B.R. 453.

In establishing the "aggregate value" of the property of a deceased person under the Ontario Succession Duty Act, R.S.O. 1897, as amended by 62 Vict(2) c. 9, and 1 Edw. VII. c. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of deceased's equity of redemption therein. *Atty.-Genl. for Ontario v. Lee* (1905), 9 O.L.R. 9, 10 O.L.R. 79.

"Property."

Where a testator had, more than a year before his death, and while in comparatively good health conveyed the homestead to his two daughters in fee, and the conveyance was at once registered but no change of possession took place it was

held that the conveyance could not be deemed to have been made in contemplation of death within section 4, sub-section (b), but that it came within sub-section (c) of that section, which read in connection with the interpretation section, whereby property includes real as well as personal estate, and was subject to duty. *Re George Roach* (1905), 10 O.L.R. 208.

Succession duty is payable in New Brunswick on deposit receipts issued by a branch of the Bank of British North America in New Brunswick, payable to a person domiciled in Nova Scotia. *The King v. Lovitt* (1906), 37 N.B.R. 558.

Deposits
receipts.

Where the deceased had an insurance on his life, the policy being made payable in his lifetime to his wife, and the amount was after his death paid to her, it was held that the amount so paid formed part of the aggregate value of the estate for the purpose of affixing the amount of succession duty, although itself exempt from duty. *In re Shambrook Estate* (1908), 44 C.L.J. 461; 28 C.L.T. 575.

Life
insurance.

Under the Nova Scotia Act a life interest or income is liable to the payment of duty. *Re Estate Cronan* (1895), 27 N.S.R. 436.

The powers of a provincial legislature in Canada, being strictly limited to "direct taxation within the province," any attempt under a Succession Duty Act to levy a tax on moveable property locally situate outside the province is beyond their competence. *Woodruff v. Atty.-Genl. for Ontario* (1908), 12 O.W.R. 611; 24 T.L.R. 912; reversing judgment of Ontario Court of Appeal, (15 O.L.R. 416), and restoring judgment of Falconbridge, C.J., 9 O.W.R. 18.

As to amendments of the law in Ontario, see Ontario Statutes (1899), c. 9; (1901), c. 8; (1905), c. 6.

As to legislation in Alberta on this subject, see Ordinances, 1903, Ch. V.

As to the Quebec Succession Duty Act, see *Lambe v. Manuel* (1903), A.C. 68.

CHAPTER XIII.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

SECT. 1.—*Of the Time of Vesting.*

Property vests in executor from moment of testator's death. As the interest of an executor in the estate of the deceased is derived exclusively from the Will it vests in him from the moment of the testator's death.

Property vests in administrator from time of grant. On the other hand an administrator derives his title wholly from the Court; he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant(a).

Until grant personal estate of intestate vests in Judge of Court of Probate. By 21 & 22 Vict. c. 95, s. 19, "From and after the decease of any person dying intestate and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being in the same manner and to the same extent as heretofore they vested in the Ordinary."

Property of personal chattels draws to it the possession. All moveable goods, though in many different and distant places, vest in the executor in possession presently upon the testator's death; for it is a rule of law, that the property of personal chattels draws to it the possession. But it is otherwise of things immoveable, as leases for years of land or houses; for of these the executor or administrator is not deemed to be in possession before entry (b). But a reversion of a term, which the testator granted for part of the term, is in the executor immediately by the death of the testator(c).

No possession of immoveables before entry; except leasehold reversion. For particular purposes the letters of administration relate back to the time of the death of the intestate(d).

(a) Williams (10th ed.) 467, 468; Woolley v. Clark, (1822) 5 B. & Ald. 744.

(b) Williams (10th ed.) 472, 473.

(c) Prattle v. King, (1681) Sir T. Jones' Rep. 169.

(d) See ante, p. 98, as to what an administrator may do before grant.

Thus, an administrator may have an action of trespass (e) in actions for trespass or trover; or trover for the goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for the wrong done (f).

So the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so in actions on covenants in leases; as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate, and so as to render him liable to account for the rents and profits of it from the death of the intestate (g).

So where a person, acting on behalf of the intestate's estate, enters into a contract before grant of administration, on letters of administration being granted to him the administration will have relation back, so as to entitle him as administrator to sue upon it (h). in actions on contracts.

But this doctrine of relation back on the grant of administration would seem to apply only where it is for the benefit of the estate, and to enable the administrator to sue for its protection (i). The relation back must be for the benefit of the estate.

In *Re Watson* (j) it was stated by Wills, J., to be a principle of law that where work is done on the credit of the estate by the order of one who afterwards obtains administration and ratifies the contract, the estate is bound if the work done is for the benefit of the estate. In that case however the administrator refused to ratify work done by a solicitor relating to the estate before the grant of administration, and it was held the solicitor could not recover. This decision was affirmed on appeal (k), but Lord Esher, M.R., doubted whether the administrator, after he became administrator, and so was acting in the interests of other persons, could have ratified a prior contract made with himself; and Lindley, L.J., said, "We Doubtful whether administrator can ratify prior contract so as to render the estate liable.

(e) *Tharpe v. Stallwood* (1843) 12 L. J. (N. S.) (C. P.) 241, where all the authorities are considered.

(f) *Long v. Hebb*, (1652) Sty. 341; *Foster v. Bates*, (1843) 12 M. & W. 226, 233; and see *Williams* (10th ed.) 469.

(g) See *Rex v. Horsley* (Inhabitants of), (1807) 8 East, 405, 410, per Ld.

Ellenborough.

(h) *Bodger v. Arch*, (1854) 10 Exch. 333; and see also *Foster v. Bates*, *ubi sup.*

(i) *Morgan v. Thomas*, (1853) 17 Jur. 283.

(j) (1886) 18 Q. B. D. 116.

(k) 19 Q. B. D. 234.

have not to determine whether if the administrator had decided to pay these costs he could have recovered them from the estate."

There is no general equitable principle that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it (*l*); and there is certainly no rule of law or principle of equity which obliges the administrator to pay, as administrator, for work which he has not ordered and which has not been done for him (*m*).

It would seem that as to real estate coming within the operation of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, in the absence of and until the constitution of a personal representative of the deceased the legal estate will devolve on the heir-at-law (*n*); and that upon administration being taken out, the grant will have the effect of vesting the land in the administrator by relation, so as to enable him to bring actions in respect of that property for matters affecting the same subsequent to the death of the intestate (*o*).

But the relation back shall not divest any right legally vested in another between the death of the intestate and the commission of administration; for instance, an execution sued out on the goods of the tenant of an intestate landlord before grant of administration has priority to the administrator's right on his appointment to a year's rent under 8 Anne c. 17 (*p*).

Although on the grant of letters of administration the administrator is entitled to all the rights which the intestate had at the time of his death vested in him, yet no right of action accrues to the administrator until he has obtained the grant. Consequently in an action for wrongful conversion (*q*), or in an action on a bill of exchange payable to but accepted

As to real estate of intestate, until grant it vests in heir-at-law.

The grant vests it in administrator, with right to sue for matters subsequent to death.

Right legally vested in meantime not divested by relation back.

No right of action accrues to administrator until grant.

Effect on Statute of Limitations.

(*l*) See *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435.

(*m*) *Re Watson*, (1887) 19 Q. B. D. 234, 236, per Ld. Esher, M.R.

(*n*) See per North, J., in *John v. John*, [1898] 2 Ch. 573, 576.

(*o*) See per Stirling, L.J., in the

Goods of Pryse, [1904] P. 301, 305.

(*p*) *Waring v. Dewbury*, (1717) Gilb. Eq. Rep. 223; Williams (10th ed.) 471.

(*q*) *Pratt v. Swaine*, (1828) 8 B. & C. 285.

after the death of the deceased (*r*), the Statute of Limitations begins to run from the date of administration, and not from the day of the wrongful conversion of the goods of the deceased or the day of payment of the bill.

But the stat. 3 & 4 Will. IV. c. 27 ("An Act for the limitation of actions and suits relating to real property and for simplifying the remedies for trying the rights thereto"), s. 6, enacts that "for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." This section applies to an administrator claiming a chattel interest in land (*s*), and to cases arising under s. 40 as well as to cases arising under the earlier part of the Act (*t*), but not to any claim not within the purposes of the Act.

SECT. 2.—Of the Quality of the Estate.

The interest of an executor or administrator in the goods of his testator or intestate is not the same as in his own goods; the reason given is, that he has them not in his own right but in the right of another; that "by law he is but the minister and dispenser and distributor of these goods" (*u*). Consequently writs of execution upon judgments against executors are to levy so much of the goods of the testator in his hands to be administered; considering them, in his hands, still as the testator's. And the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right (*v*). So if the executor die intestate, or on the death of an administrator, the goods of his testator, or intestate, vest not in his administrator, but in the administrator *de bonis non* of the original testator or intestate (*x*). And even before the stat. 33 & 34

Interest of executor or administrator merely to minister and distribute.

Consequent effect: on writs of execution upon judgments;

in making grants *de bonis non*;

in cases of felony or treason.

(*r*) *Murray v. East India Co.*, (1821) 5 B. & Ald. 204.

(*s*) *Re Williams*, (1886) 34 C. D. 558.

(*t*) *Re Bonsor and Smith's Contract*, (1884) 34 C. D. 558 in note.

(*u*) 9 Rep. 88 b; Winter, Off. Ex. 192 (14th ed.).

(*v*) *Farr v. Newman*, (1792) 4 T. R. 621.

(*x*) See *ante*, p. 117.

Vict. c. 23, if he committed felony, or treason, although he forfeited his own goods, yet those which he had as executor or administrator were not forfeited (y).

As to debts incurred by executor in carrying on testator's business.

Where an executor carries on a business under the directions contained in the Will of the testator, and in that character contracts a debt, the debt is one for which an action must be brought against the executor personally, for which judgment must be obtained *de bonis propriis* of the executor, and no action can be successfully brought against the executor as executor, and no execution can be had *de bonis testatoris*, since the debt was not the debt of the testator. The right of the executor to indemnity out of the assets of the testator, and of the creditor to stand in his place to that extent, is another matter (z).

Inference of gift by beneficiaries of assets so as to render them liable to execution for executor's own debt.

Similar inference from conduct of testator's creditors.

But lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the Will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor and entitle his judgment creditor to take them in execution (a).

A similar inference may be drawn from the conduct of the testator's creditors to the executor, so as to preclude them restraining a creditor of the executor from selling the testator's leaseholds under an execution for his own debt (b).

Deceased's assets unaffected by bankruptcy of executor or administrator.

On the bankruptcy of an executor or administrator the property passing to the trustee in the bankruptcy does not include the property of the deceased, since being property held by the bankrupt on trust for other persons it is not property which can be in the order and disposition of the bankrupt with the consent of the true owner and divisible among his creditors (c).

Mode of application of assets where deceased was partner in business.

Where the deceased carried on business in partnership, and the business after his death is continued by the surviving partner, who subsequently becomes bankrupt, the settled rule is that

(y) See *ante*, p. 21; Williams (10th ed.) 474.

(z) *Re Morgan*, (1881) 18 C. D. 93; and see *post*, p. 381.

(a) *Re Morgan*, *ubi sup.*

(b) *Ray v. Ray*, (1815) Coop. 264.

(c) See 46 & 47 Vict. c. 52, s. 44 (1) and (iii.); *Kitchen v. Ibbetson*, (1873) L. R. 17 Eq. 46, 49.

the joint estate must be applied in payment of joint creditors, and the separate estate in payment of separate creditors (*d*).

So in respect to land, no merger can take place of the estate held by a man as executor or administrator in that which he holds in his own right, yet when the executor or administrator is the only person entitled, as residuary legatee, or next-of-kin, to the beneficial ownership, and all the debts are paid, he will have the term in his own right, and it may become merged if such is the intention (*e*). As to merger.

Notwithstanding a statement in Toller (*f*), and dicta in old cases (*g*), to the effect that at law an executor paying with his own money a debt of his testator may elect to take any specific chattel as a compensation, the equitable rule, which now prevails, would seem to be that in such case he cannot acquire as a purchaser an absolute title to specific chattels (*h*). But where the debt due to the executor of an insolvent testator exceeds the value of the testator's assets, the executor is not bound to realise the assets, *i.e.*, convert them into money, before exercising his right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt (*i*). Executor or administrator cannot elect to take specific chattels as compensation for sums owing to him : but executor is not bound to realise before exercising his right of retainer ;

In *Elliott v. Kemp* (*k*) Parke, B., is reported to have said that an administratrix might acquire a title to chattels by appropriating them to herself as her own share without any agreement with the other next-of-kin entitled under the Statutes of Distribution. But it is submitted that an administrator cannot so appropriate except by agreement with the other persons entitled to share, since it would in effect be constituting himself a purchaser thereof from himself, which the law does not allow (*l*). and administrator cannot appropriate specific chattels to himself as his own share as next-of-kin.

(*d*) *Ex parte* Morley, (1873) L. R. 8 Ch. 1026; *Re* Melor, (1879) 12 C. D. 917; 13 C. D. 465; and see *post*, p. 368.

(*e*) See Williams (10th ed.) 478, and *post*, p. 252.

(*f*) Toller (5th ed.) 238.

(*g*) *Elliott v. Kemp*, (1840) 7 M. & W. 306, 313, per Parke, B.; and see Williams (10th ed.) 482.

(*h*) *Hearn v. Wells*, (1844) 1 Coll. 333, per Knight Bruce, V.-C.

(*i*) *Re* Gilbert, [1898] 1 Q. B. 282; approved in *Re* Rhoades, [1899] 2 Q. B. 347.

(*k*) (1840) 7 M. & W. 306, 313.

(*l*) See Williams (10th ed.) 484, n. (*f*); see also as to appropriation, *post*, p. 502.

SECT. 3.—*Of the Quantity of the Estate.*

Whole personal estate and such real estate as is affected by the Land Transfer Act, 1897, vest in executor or administrator.

The whole of the personal estate of the deceased vests in his personal representative or representatives, and in the case of deaths after the 31st December, 1897 (that is after the commencement of the Land Transfer Act, 1897), the whole of the real estate also (including any real estate over which the deceased has exercised a general power of appointment), other than and except land of copyhold tenure or customary freeholds in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*m*), but including equitable estates or interests in copyholds (*n*).

But not a joint estate.

Property in which the deceased had merely a joint estate or interest passes to the survivor, and does not vest in the deceased's personal representative (*o*).

To what extent equity follows the law with regard to joint tenancy.

Except in the case of trusts executory, limitations which confer an estate in joint tenancy at law, will have the same effect in equity, when there are no circumstances which afford grounds for a departure from the rule of law; so that where two or more persons purchase lands, and advance the money in equal shares, and take a conveyance to them and their heirs, there is a joint tenancy (*p*). But joint tenancy is not favoured in equity, and Courts of Equity will lay hold of any controlling circumstance to prevent a survivorship and create a trust. Thus if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase-money, he will be entitled to his share of the purchase as a resulting trust. So if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, his representatives will be entitled to his proportion as a trust; for the nature of the transaction as a loan of money repels the presumption of an intention to hold the mortgage as a joint tenancy. So if two

(*m*) 60 & 61 Vict. c. 63, s. 1.

(*n*) *Re Somerville & Turner's Contract*, [1903] 2 Ch. 583.

(*o*) See Williams (10th ed.) 486.

(*p*) Smith's Comp. of Law of Real

and Personal Property (5th ed.), s. 605. As to the rights *inter se* of joint owners and joint tenants see Kennedy *v.* De Trafford, [1897] A. C. 180.

persons jointly purchase an estate, and pay unequal proportions of the purchase-money, and take the conveyance in their joint names, in case of the death of either, there will be no survivorship, but they will be deemed to have purchased as in the nature of partners, and to have intended to hold the estate in proportion to the sums which each advanced (*q*). So if two or more make a joint purchase of land, and afterwards one of them lays out a considerable sum in repairs and improvements and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it, as being in the nature of a joint undertaking or partnership (*r*).

On a purchase by two persons, contributing the purchase-money in equal shares, parol evidence of surrounding circumstances and of subsequent dealings is admissible, notwithstanding the Statute of Frauds, to prove an intention to hold in severalty, but it would seem that parol evidence of statements of intention is not admissible (*s*).

Parol evidence of surrounding circumstances admissible to show intention.

There is an exception to the *jus accrescendi* or right of survivorship as incident to joint tenancy in favour of partners; the maxim of the common law, *jus accrescendi inter mercatores pro beneficio commercii locum non habet*, being applicable. On the death of a partner, although a Court of Law may, in general, view the partnership property only according to the state of the legal title, the legal personal representative of the deceased partner has a general lien upon the surplus partnership assets in respect of his interest in the partnership on taking the partnership account. This lien, however, does not interfere with the right of the surviving partner to deal with the separate properties, real and personal, belonging to the partnership for the purpose of realisation, and to give a good title to persons dealing in good faith with him in respect of those properties either as purchasers or mortgagees (*t*). So with respect to choses in action, though the right of the deceased joint tenant devolves on his personal representative, the

Principles as to partnership.

(*q*) Story's Eq. Jur., § 1206.

(*r*) *Lake v. Gibson*, (1729) 1 Eq. Cas. Abr. 291, s. 3.

(*s*) *Harrison v. Barton*, (1860) 1

J. & H. 287.

(*t*) *Re Bourne*, [1906] 1 Ch. 113, and (C. A.) [1906] 2 Ch. 427.

remedy survives to his companion, who alone must enforce the right by action. And it has been doubted whether the rule *jus accrescendi inter mercatores pro beneficio commercii locum non habet* can in any case be enforced but in a Court of Equity (u).

Dissolution of partnership by death.

Except in the case of a limited partnership registered in accordance with the provisions of the Limited Partnerships Act, 1907 (r), a partnership is dissolved by the death of a partner, and in the absence of any agreement between the partners the representatives of the deceased partner are entitled to have the partnership business wound up and disposed of, and the rights of the surviving partner or partners and the representatives of the deceased partner will be regulated by the provisions of the Partnership Act, 1890 (y).

Authority of surviving partner.

Sect. 38 of the Partnership Act, 1890, provides that "after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

Effect of surviving partner carrying on business without any final settlement of accounts.

Sect. 42 (1) provides that "where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the out-going partner or his estate, then in the absence of any agreement to the contrary, the out-going partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets."

Mode of application of assets after dissolution.

And by s. 44, in settling accounts after a dissolution, "the assets of the firm including the sums, if any, contributed by

(u) See Smith's Mercantile Law (3rd ed.) 149; and see *post*, 366.

(r) 7 Edw. VII. c. 24.

(y) 53 & 54 Vict. c. 39. The good-

will of the business if saleable must be sold and the proceeds accounted for: *Hill v. Fearis* [1905] 1 Ch. 466.

the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order :—

1. In paying the debts and liabilities of the firm to persons who are not partners therein ;
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital ;
3. In paying to each partner rateably what is due from the firm to him in respect of capital ;
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

Although as between the partners themselves one cannot dissociate his share of a particular asset from the rest of the partnership assets, yet as between beneficiaries under the Will of a deceased partner, where the partnership is solvent, the testator is entitled to treat his interest in any particular asset of the partnership as something he could separate from the rest of the partnership assets, and give it in a different direction to his general share in the business, and the beneficiaries are bound to give effect as best they can to the wishes the testator has expressed ; and where, under such circumstances, a testator made a specific devise of his share in partnership freeholds, it was held that, as between the beneficiaries under the Will, the devisee took it free from liability to contribute to the partnership debts (x).

A limited partner under the Act of 1907 (a) must be described as such in the particulars of registration, and the particulars must state the sum contributed by him and whether paid in cash or how otherwise, and during the continuance of the partnership he is not at liberty to draw out or receive back any part of his contribution, and is not liable for the debts or obligations of the firm beyond the amount so contributed (s. 4 (2)), provided he does not take part in the management of the partnership business (s. 6 (1)). A limited partnership is not dissolved by the death or bankruptcy of a limited partner (s. 6 (2)). In the event of the dissolution of a limited partnership, its affairs shall be wound up by the

Effect of the
Limited
Partnership
Act, 1907.

(x) *Re Holland*, [1907] 2 Ch. 88.

(a) 7 Edw. VII. c. 24.

general partners, unless the Court otherwise orders (s. 6 (8)); and the provisions of the Companies Acts, 1862 to 1900, and of the rules made thereunder, except as otherwise may be provided, are to apply to the winding-up by the Court of limited partnerships with the substitution of general partners for directors. A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor (s. 6 (5) (6)); but an assignment shall be deemed to be of no effect, for the purposes of the Act, until advertised in the "Gazette" (s. 10). A general partner, that is, any partner who is not a limited partner as defined by the Act (s. 8), is liable for all debts and obligations of the firm (s. 4 (2)). Subject to the provisions of the Act, the Partnership Act, 1890, and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last mentioned Act, apply to limited partnerships (s. 7).

Effect of bare possession of goods by deceased.

The circumstance of the deceased having died in possession of goods will not give his personal representative a title to sue for them, even against a mere wrong doer, if it can be shown that the title is not in the plaintiff (b).

But where after his bankruptcy a bankrupt acquires goods and dies intestate, so long as the trustee in the bankruptcy does not interfere, the title of his administrator is good as against everyone else (c).

On construction of Wills question whether executor has legal estate in land or merely power of sale.

As regards deaths happening before the commencement of the Land Transfer Act, 1897, and as regards deaths happening subsequently in respect of land of copyhold tenure or customary freeholds excepted from the expression real estate by s. 1 (4) of the same Act, questions may arise on the construction of Wills whether the legal estate in land is vested in the executors as trustees with or without power of sale, or whether the executors be merely *ex officio* invested with a power of sale.

(b) Elliott v. Kemp, (1841) 7 M. & W. 306.

(c) Fyson v. Chambers, (1842) 9 M. & W. 460; and cf. Cohen v.

Mitchell, (1890) 25 Q. B. D. 262; and see Hunt v. Fripp, [1898] 1 Ch. 675, and *post*, p. 532.

With reference to such cases the following distinctions may be noticed:—

A devise of land to executors to sell passes the interest in it; but a devise that executors shall sell the land, or that the land shall be sold by the executors, gives them but a power and no estate passes to them (*d*), although under the power vested in them by the Will they can vest in the purchaser such estate as their testator had (*e*).

Where a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made, if the proceeds are distributable by the executor, he has the power by implication (*f*).

When power of sale is to be implied.

Apart from statute, to enable executors to sell, the power must either be expressly given to them, or necessarily be implied from the produce being to pass through their hands in the execution of their office, as in payment of debts and legacies (*g*).

A charge of the real estate with debts *simpliciter* does not give the executors an implied power of sale (*h*).

Effect of charge of real estate with debts or devise to another charged with debts.

Where the estate is devised to a particular person charged with the payment of debts or legacies, the doctrine of implying a power in the executors does not apply, since the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title (*i*).

With regard to any Will which has come into operation after the 18th August, 1859, Lord St. Leonard's Act (22 & 23 Vict. c. 35, ss. 14, 15, 16 and 18) enables real estate, charged by a testator with the payment of his debts or any legacy, to be sold or mortgaged in the following events: if the property is devised by the testator so charged to trustees for the whole of his estate or interest therein (*k*), then, under ss. 14 and 15, such devisees

Effect of Lord St. Leonard's Act.

(*d*) Williams (10th ed.) 490; Farwell on Powers (2nd ed.), p. 68.

(*e*) Forbes v. Peacock, (1843) 11 M. & W. 630; and see per Kekewich, J., in *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339, 346.

(*f*) Williams (10th ed.) 490.

(*g*) Bentham v. Wiltshire, (1819) 4 Madd. 44, 49, per Leach, V.-C.

(*h*) Doe v. Hughes, (1851) 6 Exch. 223.

(*i*) Colyer v. Finch, (1856) 5 H. L. C. 905.

(*k*) See *In re Adams and Perry's Contract*, [1899] 1 Ch. 534.

in trust, or their successors in trust, are the persons to raise the same by sale or mortgage, but if the property so charged is not devised in such terms as that his whole estate and interest therein shall become vested in any trustee, by s. 16 the executor is given the like power of raising the moneys as by ss. 14 and 15 is vested in devisees in trust. But s. 18 places a limit on the provisions of ss. 14, 15 and 16 by providing that they are not to extend to a devise to any person or persons in fee or in tail or for the testator's whole estate and interest charged with debts or legacies.

It has been held that a devise by way of executory or springing use, *e.g.*, a devise to the first son who shall attain twenty-five years of age—is not a devise in fee within the meaning of s. 18, and in such a case the real estate charged by the testator with his debts and legacies can be sold by the executor under s. 16 (*l*).

Act does not apply to an administrator *cum testamento annexo*.

There can be no implied power in an administrator to pay debts, and Lord St. Leonard's Act, s. 16, confines the power thereby given to executors; consequently on the renunciation of the executors an administrator with the Will annexed cannot exercise any implied power which the executors would have had under the Will, and has no power to sell real estate by virtue of that Act (*m*).

Direction to pay debts *simpliciter* charges the real estate.

Where a testator by his Will simply directs all his debts to be paid, such a direction amounts to a charge of all his debts on all his estates, unless it is countervailed by something which afterwards appears in the Will (*n*).

Otherwise direction that debts are to be paid by executors.

But where a testator directs that his debts are to be paid by his executors, it is *prima facie* to be considered that he means the payment to be made by them out of the funds which come to their hands as executors (*o*). That would apply to leasehold property, but not to freehold. But it is a question of intention, to be gathered from the whole Will,

(*l*) *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339.

(*m*) *Re Clay and Tetley*, (1880) 16 C. D. 3.

(*n*) *Corser v. Cartwright*, (1875) L. R. 7 H. L. 731, 735, per Lord Cairns.

(*o*) *Wasse v. Heslington*, (1834) 3 My. & K. 495.

whether all the property which the testator gives to his executors shall be subject to the payment of his debts.

Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, or only a life interest, or no beneficial interest at all. But, in all the cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate (p). The rule therefore would not apply where all the real estates are not devised to the executors, and the effect would be to subject a part of the real estate to the liability and to exempt other part (q), or where there are two or more executors to whom unequal benefits are given by the Will (r).

Effect of direction to executors to pay debts followed by gift of real estate to them.

But the residuary real estate may be charged by force of the word "residue" coupled with the direction to pay debts, although in the application of the above principle other real estate is not charged (s).

Word "residue" coupled with direction to pay debts may charge residuary real estate.

Doe v. Hughes (t) decided that a direction that debts should be paid only created an equitable charge and did not enable the executors to give the legal estate to a purchaser. But in all cases where there is a devise of the legal estate to the executors they can give the legal estate, and it is immaterial whether or not they take the beneficial interest (u).

Direction to pay debts simpliciter creates equitable charge only.

In Wills made as well before as since 1838 a devise to trustees in trust to pay the testator's debts vests in them the absolute legal fee. But a mere charge of debts on the lands devised, the trustees not being directed to pay the debts, does not enlarge the estate of the trustees (x).

Mere charge of debts will not enlarge estate devised to trustees.

Yet where there is a direction that the debts shall be paid by the executors, or simply that the testator's debts shall be

Otherwise where debts are directed to be paid by executor-trustees.

(p) *Re Bailey*, (1879) 12 C. D. 268, 273.

(q) *Ibid.*

(r) *Harris v. Watkins*, (1854) Kay, 438.

(s) *Re Bailey*, *ubi sup.*

(t) (1851) 6 Exch. 223.

(u) *Re Tanqueray-Willlaume and Landau*, (1882) 20 C. D. 465; *Re De Burgh Lawson*, (1889) 41 C. D. 568.

(x) *Hawkins on Wills*, 151.

paid, followed by a devise of real estate to trustees, who are also named executors, it is to be presumed that it was the intention of the testator that the executors should take such an estate as would enable them to pay the debts out of the property devised to them (*y*), and the machinery of the Statute of Uses will not be applied to make them mere conduit pipes of the legal estate (*z*).

Effect of
Land Transfer
Act, 1897.

Now, under the Land Transfer Act, 1897 (s. 1 (1)), in cases of death after the 31st December, 1897, real estate (except land of copyhold tenure or customary freehold as mentioned in sub-s. 4) vests in the personal representatives of the deceased, and s. 2 (2) provides that the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate. Since, however, the real estate vests in all the executors, the executors who have proved the Will cannot convey the legal fee simple without the concurrence of a co-executor who has not proved or renounced and to whom power is reserved to prove (*a*). But a good title can be made by general executors to the testator's real estate in England without the concurrence of special executors of foreign assets (*b*).

Some or one
only of several
joint repre-
sentatives
cannot sell
without the
authority of
the Court.

When pre-
sumption
arises that all
debts are paid.

In the case of *Re Tanqueray-Willaume and Landau* (*c*), the Court of Appeal held, that where executors in whom the legal estate is vested are selling real estates charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease, but intimated that after the lapse of twenty years a presumption arises that the debts have been paid, especially when a beneficiary is found to be in the enjoyment of the estate, and the purchaser, therefore, in such latter case,

(*y*) *Marshall v. Gingell*, (1882) 21 C. D. 790.

(*z*) *Re Brooke*, [1894] 1 Ch. 48.

(*a*) *Re Pawley and London and*

Provincial Bank, [1900] 1 Ch. 58.

(*b*) *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

(*c*) (1882) 20 C. D. 465.

is put upon inquiry; and, it would seem there is no distinction in this respect between a devise to executors subject to a charge of debts, and a devise to them upon trust for the payment of debts. This rule or presumption, however, does not apply to executors selling leaseholds or personal estate of their testator. The distinction between real and personal estate in this respect appears to be that in the one case it is the exercise by trustees of a mere power of sale, and in the other it is the exercise by the executor of the right which the law gives him as executor to deal with assets vested in him in that character(d). And it would seem to follow that as to persons dying since the commencement of the Land Transfer Act, 1897, real estate vesting in the personal representatives under the Act will now stand on the same footing as chattels real in respect of the above rule or presumption.

The mere circumstance that a conveyance or mortgage by an executor does not purport to be executed by him in that capacity, but as beneficial owner, is not sufficient, in the absence of anything in the transaction to show the contrary, to raise the presumption that he was acting otherwise than in the discharge of his duties(e).

Presumption executor acted as such although expressed to convey as beneficial owner.

CANADIAN NOTES.

In *Dini v. Fauquier* (1904), 8 O.L.R. 712, where a plaintiff claimed in the action as administrator, the Divisional Court held that letters of administration issued after action and before trial were sufficient to support the action, although the plaintiff, *in propria persona*, had no interest in the estate. Street, J., said: "Before the Judicature Act a distinction was well established to the effect that in an action brought by an administrator it was necessary that letters of

Letters of administration relate back.

(d) *Re Whistler*, (1887) 35 C. D. 561.

(e) *Corser v. Cartwright*, (1875) L. R. 7 H. L. 731; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101;

and see *Re Verrell's Contract*, [1903] 1 Ch. 65, where under peculiar circumstances a purchaser's objection to title was allowed; and see also *Re Henson* (1908) W. N. 138.

administration must have been granted before action brought, but that in an action by an executor it was sufficient if probate were taken out at any time before trial. The reasons given for the distinction were that the executor's title was under the will and probate was only necessary for the purpose of proving his title, while an administrator had no title except under the letters of administration, and further that an administrator in an action at law was obliged to make *oyer* of the letters of administration. The distinction did not, however, exist in equity." The Court applied the rule in equity. And see *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499; *Edinburg Life v. Allen* (1873), 19 Gr. 593; *Trice v. Robinson* (1888), 16 O.R. 433; *Chard v. Rae* (1889), 18 O.R. 371. For particular instances of the application of the general principle as to relation back of the title of an administrator, see *Deal v. Potter* (1867), 26 U.C.R. 578, (right to replevy goods taken before grant of administration); *Christie v. Clark* (1866), 16 C.P. 544, 27 U.C.R. 21, (right to sue an administrator on a contract for sale of intestate's business made by administrator before grant of administration); *Robertson v. Burrill* (1895), 22 A.R. 356 (right to rely on written acknowledgment of indebtedness to the estate, made to administrator before grant of administration, as a sufficient acknowledgment within the Statute of Limitations).

Executor's
title.

An executor's title is derived from the will and not from the probate. Consequently execution may issue against the lands of a deceased debtor on a judgment recovered against an executor before probate. *Stump v. Bradley* (1868), 15 Gr. 30; and where executors before probate unsuccessfully defend an action as executors they will be held to have accepted office and the judgment and all proceedings thereon will be valid. *McDonald v. McDonald* (1890), 17 A.R. 192. And see *Robinson v. Coyne* (1868), 14 Gr. 561; *Bryce v. Beattie* (1862), 12 C.P. 409.

Administra-
tor cannot

An administrator who has accepted letters of administration cannot resign, renounce or in any way relieve himself

of the duties of administrator without the order of the Court of Probate. *Jost v. McNeil* (1887), 20 N.S.R. 159; *Kaulbach v. Mader* (1902), 35 N.S.R. 219. resign
without
order.

Where a widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors, the creditor who advanced the goods was held to have no charge against the estate, but must proceed against the executors personally. *Campbell v. Bell* (1869), 16 Gr. 115. An executor is entitled to take the personal property at its value for a debt due by the estate to him, and his purchase at public auction of the testator's personal estate in lieu of money due him is valid. *Yost v. Crombie* (1859), 8 C.P. 159.

An assignment by an administratrix of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed as administratrix. *Yarrington v. Lyon* (1866), 12 Gr. 308.

Carrying on Business.

A testator's direction to his executors to carry on business with his surviving partners does not authorize the executors to embark any new capital in the business. *Smith v. Smith* (1866), 13 Gr. 81. Carrying on
business.

An executor who carries on the business of the deceased for the benefit of the estate under authority conferred by the will is personally liable for debts incurred while and for carrying on such business, and there is no claim against the estate. The vendor of the goods, however, has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred. *In re Braun, Braun v. Braun* (1902), 14 Man. L.R. 346.

An administrator who, acting in good faith, and for the benefit of the estate sells land at public auction, and after the sale on the same day, acquires title in himself through the buyer, becomes valid owner of the land. *McLeod v. Gillis* (1868), 7 N.S.R. 257; *Smyth v. McLean* (1868), 7 N.S.R. 310.

Personal property devised to executors for a purpose which fails must be distributed by the executors among the

next of kin. *Estate of Alexander McDonald* (1853), 2 N.S.R. 123.

Receipts by
one
executor or
trustee.

One executor can receive payments and make settlements irrespective of his co-executor and his receipts will be sufficient. Each has an independent right over the personal property of his testator, but it is not so as respects trustees. *In re Estate of Bath*, 12 N.S.R. 604, and see *Re Administrator, Trueman v. Dixon* (1878), 18 N.B.R. 33.

Where executors were to take "share and share alike" and the only charge imposed on them was the maintenance of the testator's wife, who pre-deceased him, it was held that they took beneficially. *Ballard v. Stover* (1887), 14 O.R. 153.

Undisposed of personalty is held by executors in trust for the next of kin, unless the will shews that the executors are to take beneficially. *Thorpe v. Shillington* (1868), 15 Gr. 85. See R.S.B.C., c. 73, s. 51.

Where property is bequeathed to executors upon trusts which fail for uncertainty, they do not take the property beneficially. *Davidson v. Boomer* (1868), 15 Gr. 1; *Re Wilson*, 30 O.R. 553. Nor where they take upon trusts which do not exhaust the estate, though the gift upon trust is coupled with a power to apply and dispose of the whole estate as to them in their uncontrolled and absolute discretion shall seem fit. *Re Brown* (1891), 8 Man. R. 391.

Manifest
omission of
words.

Where a testator bequeathed to his "executors herein-after named in trust to dispose thereof, etc.," but no property was mentioned, the manifest omission of certain words may be supplied by the Court, and accordingly the words "my property" were read into the will. *Colvin v. Colvin* (1893), 22 O.R. 142. See *May v. Logie* (1896), 23 A.R. 785, 27 S.C.R. 443; *Re Holden* (1903), 5 O.L.R. 156.

Where a will creates a life estate in chattels the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life and not the executor then becomes liable for them to the person entitled in remainder. *In re Munsie* (1883), 10 P.R. 98. Life estate
in chattels.

"Executors and administrators" is equivalent to "heirs" as a word of limitation in a will devising lands. *Mercer v. Neff* (1898), 29 O.R. 680.

Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees when all the testator's known debts are paid, or by mere lapse of time. *Ewart v. Gordon* (1867), 13 Gr. 40; *Cameron v. Campbell* (1882), 7 A.R. 361; *Huggins v. Law* (1887), 14 A.R. at p. 401.

A devise, as follows, "half of my lands, etc., I leave in the hands of my executors to pay my debts," gives them the fee. *Dowling v. Power* (1856), 5 C.P. 480; *Moore v. Power*, 8 C.P. 109.

A devise of land held by the testator on mortgage, subject to a demandant's right of dower, to executors on trust to reconvey on payment of the mortgage money, gives an estate in fee to the executors, and renders them liable to an action for dower. *Low v. Sparks* (1865), 14 C.P. 25.

On a devise to named devisees with authority to executors to cause the proceeds of lands sold to be used for the support of the devisees, the executors take no estate. *McDonald v. McDona'd*, 34 U.C.R. 369.

A mere direction that executors shall sell and dispose of land, and shall have power to execute conveyances, gives them a naked power and no estate. *Gregory v. Connolly* (1850), 7 U.C.R. 500; *Hopkins v. Brown* (1853), 10 U.C.R. Naked
power
only.

125; *Woodside v. Logan* (1868), 15 Gr. 145; *Casselman v. Hersey* (1872), 32 U.C.R. 333.

Direction to
convert.

Where the will after giving pecuniary legacies contained the following paragraph, "When my lands are sold and all the legacies paid, the money remaining is to be divided, etc.," this was held a direction to executors to convert. *Woodside v. Logan* (1868), 15 Gr. 145.

Where there is a direction to convert for payment of debts, and a provision that conversion shall not be postponed beyond a certain time, the provision is directory only. *Scott v. Scott* (1858), 6 Gr. 366.

A devise to executors upon trust "to allow and give the use thereof to A.," authorizes A., and not the executors, to lease the lands. *Heffernan v. Taylor* (1888), 15 O.R. 670.

On the devise of the rents of a farm to A., with a power to executors to lease, and after deducting all necessary expenses to pay the rents to A., it was held that the executors took the legal estate. *Whiteside v. Miller* (1868), 14 Gr. 393. See also *Orford v. Orford* (1885), 6 O.R. 6.

On a direction that so much of the estate as should be necessary should be sold to pay debts, followed by a devise of all the residue to the executors upon trust for the widow of the testator for life, and after her death to be divided amongst children, it was held that the purposes of the trust did not require the estate of the executors to extend beyond the widow's life, and that upon her death the children took a legal remainder. *Doe den. Williams v. Driscoll* (1858), 9 N.B.R. 176.

A testator died possessed of shares in a company. Afterwards upon fresh allotments of stock being made, his executrix took up the additional shares, paying the premium out

of her own money as to some of the shares and selling her right to others, and it was held that she was not entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up. *Re Sinclair, Clark v. Sinclair* (1901), 2 O.L.R. 349.

See also notes following c. 16 and c. 18.

CHAPTER XIV.

OF THE ESTATE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

Several
executors or
administra-
tors have
joint and
entire
interest:

it cannot be
divided:

it survives
without new
grant.

One cannot
release to the
other.

Release by
one is a dis-
charge of the
whole debt.

Underlease
by one passes
the entirety.

Possession of
one entitles
all to joint
right of
action.

One cannot
maintain
action at law
against the
other.

If there be several executors or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the testator or intestate, including chattels real, which is incapable of being divided; and in case of death such interest shall vest in the survivor without any new grant by the Court. Consequently, if one of two executors or administrators grant or release his interest in the testator's or intestate's estate to the other, nothing shall pass; because each was possessed of the whole before. So if one of several executors release but his part of the debt, it has been held that the whole is discharged (a). And if two executors have a term and one grant all that belongs to him the whole term passes (b).

So the act of one in possessing himself of the effects is the act of the others, so as to entitle them to a joint interest in possession, and a joint right of action if they are afterwards taken away (c).

On the same principle of a joint and entire interest it follows that at law one cannot maintain an action in right of deceased against the other, or against a third person jointly with one of themselves, since he cannot sue himself (d); nor after the death of one of several executors, can his executor be sued by the surviving co-executor for a debt due to their testator (e). But if a debtor makes his creditor and another person executors, and the creditor neither proves the Will nor acts as executor, he may maintain an action against the other for his demand on the testator (f).

(a) Williams (10th ed.) 684.

(b) Dyer, 23a.

(c) Williams (10th ed.) 685.

(d) *Ibid.*

(e) Williams (10th ed.) 726.

(f) Rawlinson v. Shaw, (1790)
3 T. R. 557.

If there are several executors appointed by the Will they must all join in bringing actions at law (g). But where one executor of several has alone proved the Will, he may sue without making the other executors parties, although they have not renounced (h).

All must join in bringing actions at law.

Ord. 16, r. 11, provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. But the Court has no power under Ord. 16, r. 11, to order a person to be added as plaintiff without his consent in writing. And in *Drage v. Hartopp* (i), where one of two executors having absconded, the other executor sued a mortgagor for personal payment, and in default of payment an account and sale, the Court refused on the interlocutory application of the defendant to add the absconding executor as defendant, as being unnecessary at that stage of the proceedings, it being immaterial for any purpose that he should be before the Court.

Effect of Ord. 16, r. 11.

(g) Williams (10th ed.) 725.

(h) Williams (10th ed.) 726, and see *Davies v. Williams*, 1 Sim. 5, 8, and

Doe v. Wheeler, (1846) 15 M. & W. 623.

(i) (1885) 28 C. D. 414.

CHAPTER XV.

OF THE ESTATE OF AN EXECUTOR OF AN EXECUTOR AND OF AN ADMINISTRATOR *DE BONIS NON*.

Transmission of interest to executor of an executor.

An executor of an executor, in however remote a series, has the same interest in the effects of the first testator as the first and immediate executor (a).

Transmission of interest to an administrator *de bonis non*.

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, etc., which remain in specie, and were not administered by the first executor or administrator. Also if an executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie (b).

Whatever property of the original testator or intestate is left unadministered on the death intestate of a sole executor, or on the death of the first administrator, as the case may be, vests in the administrator *de bonis non* of the original testator or intestate, and if such executor or first administrator had improperly retained assets as his own property, or in collusion with a vendee assigned over leasehold property for his own benefit, the same will be treated as assets unadministered and pass to the administrator *de bonis non*, who will be entitled to recover possession, or to have the sale set aside and a conveyance of the legal estate (c).

What property does not vest in administrator *de bonis non*.

If, however, the property in any of the effects of the deceased has been changed by the original executor or administrator, and has vested in him in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator *de bonis non* (d).

(a) See Williams (10th ed.) 687, and *ante*, p. 51.

(b) Williams (10th ed.) 687.

(c) Cubbidge v. Boatwright, (1826) 1 Russ. 549.

(d) Williams (10th ed.) 689.

For instance, if an administrator makes an underlease of the intestate's term, reserving rent to himself, his executors, administrators and assigns, and then dies, his executor or administrator and not the administrator *de bonis non* of the intestate shall have the rent(e).

So where A. was indebted to B. for rent, and B. died intestate, and C. his administrator having taken a promissory note for the rent also died, it was held that the note belonged to the administrator of C. and not to the administrator *de bonis non* of B.(f). So if the original executor or administrator, in his own name, and not in his representative capacity, recovers judgment and dies, his own executor or administrator must take execution of the judgment(g). But where the cause of action is such that the first administrator may sue in his representative capacity the right of action devolves upon the administrator *de bonis non*; for instance in the case of a bill of exchange endorsed generally and delivered to the first administrator it may be sued upon by the administrator *de bonis non* (h). In like manner the administrator *de bonis non* may stand in such privity of estate that he will be compelled to carry out an agreement entered into by the first administrator(i).

(e) *Drue v. Bayly*, (1675) 1 Freem. 392; *Kelly v. Shaw*, (1850) 1 Ir. C. L. Rep. 225.

(f) *Barker v. Talbot*, (1697) 1 Vern. 473.

(g) *Williams* (10th ed.) 691.

(h) *Catherwood v. Chabaud*, (1823) 1 B. & C. 150, and see *Moseley v. Rendell*, (1871) L. R.

6 Q. B. 339.

(i) *Hirst v. Smith*, (1797) 7 T. R. 182, per Kenyon, C.J.; and see *Re Watson*, (1884) 53 L. J. Ch. 305, as to the lien of a solicitor of a deceased executor or administrator upon documents, as against the administrator *de bonis non*, arising from such privity of estate.

CANADIAN NOTES.

Where the executors of a sole surviving executor of an estate in giving notice for claims omitted to give the proper notice for claims against the estate of which their testator had been to their knowledge executor, with which they had never intermeddled and of the existence of claims against which they were unaware, they were held liable to the *cestui que trust*, to whose knowledge the existence of the notice was not shewn to have come, for a fund to which their testator was responsible, and the fact that administration *de bonis non* of the estate of which their testator had been executor was subsequently granted to another person did not under the circumstances affect their liability. *Stewart v. Snyder* (1899), 30 O.R. 110.

It is provided by R.S.O. c. 337, s. 13, that executors of executors shall have the same actions for the debts and property of the first testator as he would have had if in life; and shall be answerable for such of the debts and property of the first testator as they shall recover as the first executors should do if they had recovered the same.

By the Ontario Statute, R.S.O. 1897, c. 59, s. 66, it is enacted that if an executor is appointed by the High Court or by a Surrogate Court, the executorship is not transmitted beyond the person so appointed, and that person does not become executor of an estate whereof his testator was executor.

By c. 11, s. 9, Ordinances, 1903, second session, Alberta, power is given to the surviving executor or trustee or the executors or administrators of the said surviving trustee to appoint another executor or trustee in place of the one vacating the office.

See also Canadian Notes following c. 7 and c. 13.

CHAPTER XVI.

OF THE POWER OF AN EXECUTOR OR ADMINISTRATOR.

Power of administrator equal to that of executor.

Same property in personal effects and same power to bring actions to recover them as deceased had.

Right to enter on land to remove goods of deceased.

AFTER the administration is granted the power of an administrator is equal to and with the power of an executor. As an executor or administrator has the same property in the personal effects as the deceased had when living, so he has the same power to bring actions to recover them^(a).

Prior to the Land Transfer Act, 1897, within a convenient time after the testator's death or the grant of administration, the executor or administrator had a right to enter the house descended to the heir, in order to remove the goods of the deceased; provided he did so without violence, as if the door were open, or at least the key were in the door; and although the door of entrance into the hall and parlour were open, he could not, therefore, justify forcing the door of any chamber, to take the goods contained in it; but was empowered to take those only which were in such rooms as were unlocked or in the door of which he should find the key. He had, also, a right to take deeds and other writings relative to the personal estate out of a chest in the house if it were unlocked, or the key were in it, but he had no right to break open even a chest. If he could not take possession of the effects without force, he had to desist and resort to his action. On the other hand, if the executor or administrator, on his part, were remiss in removing the goods within a reasonable time, the heir might distrain them as damage feasant^(b). Now by s. 1 of the Land Transfer Act, 1897, the real estate (except copyholds and certain customary freeholds) of a testator dying after the commencement of the Act vests in the legal personal representative. But the position of a

^(a) Williams (10th ed.) 694, and ^(b) Williams (10th ed.) 695. see post, p. 284 et seq.

legal personal representative of a tenant for life or in tail being unaffected by the Act he will be allowed a convenient time for the removal of the testator's or intestate's effects (c).

It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is, that the executor or administrator, in many instances, must sell, in order to perform his duty in paying debts and legacies; and no one would deal with an executor or administrator, if liable afterwards to be called to account (d).

Power of disposition over personal effects.

The Land Transfer Act, 1897 (s. 2(2)), now gives to the personal representatives like power over the real estate vested in them under the Act as if that real estate were a chattel real vested in them, save that some or one only of several joint personal representatives cannot sell or transfer real estate without the authority of the Court.

Powers of disposition over real estate.

Both at law and in equity the executor or administrator is the absolute owner of the assets of the testator or intestate; he does not stand in the position of a *delegatus*, and nothing can intercept that ownership, except fraud or collusion as between him and the parties with whom he deals. He is at liberty either to sell or to pledge the assets (e); and the pledgee has the right to sell the property pledged if not redeemed within the proper time (f); and so also the executor or administrator may give to another a power of attorney or authority to do any act to render a mortgage effectual, such as a power of sale or a power to collect assets (g). The rule *delegatus non potest delegare* has no application to such a case, since the position of an executor or administrator, in relation to assets of the testator or intestate, differs from that of a

Rule—*delegatus non potest delegare* does not apply.

(c) *Stodden v. Harvey*, (1610) Cro. Jac. 204.

(d) *Williams* (10th ed.) 700; *Whale v. Booth*, (1785) 4 T. R. 625.

(e) *Earl Vane v. Rigden*, (1870)

L. R. 5 Ch. 663, see per *Ld. Hatherley*.

(f) *Russell v. Plaipe*, (1854) 18 Beav. 21, 28.

(g) *Ibid.*; *Earl Vane v. Rigden*, *ubi sup.*

trustee, or a donee of a bare authority or of a particular power (*h*).

Executor or administrator to be presumed to be acting as such.

Although the legal personal representative is not justified in mortgaging to raise money for his own purposes (*i*), or for purposes which it was not his duty to perform as administrator (*k*), yet where a person who fills the position of an executor or administrator is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as such, unless there is something in the transaction which shows the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by the executor in that capacity (*l*).

But purchaser or mortgagee without the legal estate takes subject to prior equities.

But where the purchaser or mortgagee does not acquire the legal estate, as between two equities, the equity of the estate of the testator or intestate and the equity of the person dealing with the executor or administrator without notice of any impropriety, the latter must take subject to the prior equities; that is, he is postponed to the *cestuis que trust* (*m*). But to defeat a legal transfer notice of the devastavit or collusion between the purchaser or mortgagee and the legal personal representative must be shown to have existed. For fraud will vitiate any transaction, and notice of an intended misappropriation necessarily involves the purchaser or mortgagee in the breach of duty (*n*).

To defeat legal transfer notice of devastavit must be shown.

Although where a man, known to be executor, borrows on the security of his testator's assets admittedly for his own private purposes, the transaction is invalid (*o*), yet if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the

When sale or mortgage by executor residuary legatee for his own private purposes will be valid.

(*h*) See *Combe's Case*, (1613) 9 Rep. 75 b. and *Farwell on Powers* (2nd ed.), p. 446.

(*i*) *Re Morgan*, (1881) 18 C. D. 93.

(*k*) *Ricketts v. Lewis*, (1882) 20 C. D. 745.

(*l*) *Re Venn and Furse's Contract*, [1894] 2 Ch. 101, 114.

(*m*) *Re Morgan*, *ubi sup.*

(*n*) See judgment of *Ld. Eldon* in *M'Leod v. Drummond*, (1810) 17 Ves. 152; *Hall v. Andrews*, (1872) 27 L. T. 195.

(*o*) *Wilson v. Moore* (1834) 1 My. & K. 337, 356.

testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator (p).

The same principle applies to a sale or mortgage by an executor of a specific legacy of which he is specific legatee (q).

Also in case of executor being specific legatee.

The case of an executor who is a residuary legatee or specific legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee, or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration, and this immunity on the part of the purchasers is not limited to cases of legal assets, or to cases where the purchasers have obtained the legal estate or its equivalent (r).

Similar to position of legatee whose legacy has been assented to.

An executor shall not be permitted, either immediately or by means of a trustee, to be purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (s).

Executor or administrator cannot purchase assets for himself either immediately or by means of a trustee.

The principle is that a trustee for sale owes a duty to his *cestuis que trust* to do everything in his power for their benefit, and is therefore absolutely precluded from buying the trust property, irrespective of questions of undervalue or otherwise, because he may be thus induced to neglect his duty (t).

A sale, however, is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as for instance by proving the Will which relates thereto, though in point of fact he never does

Mere power of becoming trustee by proving Will is insufficient to invalidate transaction if he never acted.

(p) *Graham v. Drummond*, [1896] 1 Ch. 968, 974.

(q) *Hall v. Andrews*, *ubi sup.*; and see Coote on Mortgages (7th ed.) 416.

(r) *Graham v. Drummond*, *ubi sup.* at p. 976.

(s) *Hall v. Hallett*, (1784) 1 Cox. 184.

(t) Per Buckley, J., in *Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244, 246: and see *Nugent v. Nugent*, [1908] 1 Ch. 546.

become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld (*u*).

Executor or administrator may under-lease.

In dealing with the leaseholds of a testator or intestate, an executor or administrator may grant an underlease, if necessary for the due administration of the property. But that is an exceptional mode of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets (*x*).

May lease real estate.

Subject to a similar question it would seem that an executor or administrator may now under the authority of the Land Transfer Act, 1897, lease the testator's or intestate's real estate for the purposes of administration.

Cannot give option to purchase.

An executor or administrator, however, cannot give an option to purchase, being in this respect in the position of a trustee who cannot enter into a contract for sale to bind the estate for some years afterwards (*y*).

Effect of condition or proviso for forfeiture on alienation or sub-letting without licence.

The legal personal representative of a deceased lessee may dispose of the lease notwithstanding it contains a condition or proviso for forfeiture if the lessee should assign or let without license; the alienation by death is not a forfeiture, nor is the executor or administrator bound if he is not named in the proviso or covenant (*z*), but if the executor or administrator is named, he is bound (*a*).

May endorse promissory note or bill of exchange payable to deceased or his order.

A promissory note or bill of exchange made payable to the deceased or his order, may be indorsed by his executor or administrator (*b*).

Bills of Exchange Act, 1882, as affecting executors and administrators.

It may be convenient here to refer to those sections of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), affecting particularly executors and administrators.

Sect. 26 (1). "Where a person signs a bill as drawer,

(*u*) *Clark v. Clark*, (1884) 9 App. Cas. 733.

(*x*) *Oceanic Steam Navigation Co. v. Sutherland*, (1880) 16 C. D. 236.

(*y*) *Ibid.*

(*z*) *Scers v. Hind*, (1791) 1 Ves. 294.

(*a*) *Roe v. Harrison*, (1780) 2 T. R. 425, and *see Doe v. Bevan*, (1815) 3 M. & S. 357; *Williams* (10th ed.) 708.

(*b*) *Williams* (10th ed.) 711; *Watkins v. Maule*, (1820) 2 J. & W. 237.

indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." May avoid personal liability.

Sect. 81 (5). "Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability."

Sect. 41 (1) (c). "Where the drawee is dead presentment may be made to his personal representative." Presentment.

Sect. 41 (2) (a) provides that presentment in accordance with the rules contained in s. 41 is excused and a bill may be treated as dishonoured by non-acceptance where the drawee is dead.

Sect. 45 (7). "Where the drawee or acceptor of a bill is dead and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found."

Sect. 49 (9). "Where the drawee or indorser is dead and the party giving notice of dishonour knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found." Notice of dishonour.

Sect. 75 (2). "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by notice of the customer's death." Authority of banker determined by notice of death.

It may also be useful to refer to s. 72, which provides (*inter alia*) (1), "The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement or acceptance *suprà protest*, is determined by the law of the place where such contract was made." Requisites having regard to foreign law.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue :

(b) Where a bill, issued out of the United Kingdom, conforms as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

(2) "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill, is determined by the law of the place where such contract is made."

As to when
executor or
administrator
may claim
by election.

As to when the personal representative may claim by election, where the testator or intestate at the time of his death was entitled out of several chattels to take his choice of one or more to his own use, the following principles would seem to apply (c).

If the thing, of which the election is given, is to be done *unimoveable*, the election ought to be at the time.

If nothing passed or vested in the grantee before his election it ought to be made in the life of the parties, as if a man gives to A. such of his horses as A. and B. shall choose, the election ought to be in the life of A. But where an interest vests immediately by the grant—as if a man gives one of his horses to A. and B., after the death of A. B. may choose which he will take, for an interest vested in them immediately by the gift—election may be made by the personal representative as well as by the party himself. If the election determines only the manner or degree in which the grantee shall have the thing, his personal representative as well as the party himself may make it; for in such case the interest vests immediately. As if a lease be granted to A. for ten or twenty years, as he shall elect, the personal representative is entitled to the election.

So if the thing, of which election is given, is annual, and to have continuance, the personal representative may make the election.

As to allow-
ing time for
payment,
compromis-
ing, com-

An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient. He may

(c) See Williams (10th ed.) 713.

also, if and as he thinks fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith (*d*).

pounding,
abandoning,
and sub-
mitting to
arbitration,
or settling
debts or
claims.

Although an executor cannot discharge himself by accounting to his co-executor (*e*), yet it has been held that it is competent for an executor in a proper case to compromise a claim by his co-executor against the estate (*f*).

If one of several executors or administrators dies the powers of the office pass to the survivors (*ee*).

Survivorship
of office.

It is necessary to determine from the language of the Will whether a power is given to the executors as individuals or whether it is annexed to their office. If it is annexed to their office it can be exercised by the proving executors, to the exclusion of a renouncing executor, or by the surviving executors: that is, by the executors for the time being (*ff*). Sect. 22 of the Trustee Act, 1898 (which replaced s. 38 of the Conveyancing and Law of Property Act, 1881), provides that where a power or trust constituted after or created by instruments coming into operation after the 31st December, 1881, is given to or vested in two or more trustees (which expression by s. 50 includes the duties incident to the office of personal representative of a deceased person) jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time

As to powers
annexed to
the office.

(*d*) Trustee Act, (1893) s. 21.

(*e*) Hill v. Curtis, (1865) L. R. 1 Eq. 90, 98.

(*f*) *Re Houghton*, [1904] 1 Ch. 622; but see *De Conlova v. De Cordova*,

(1879) 4 App. Cas. 692, 703.

(*ee*) Williams (10th ed.) 720.

(*ff*) *Ciord v. Forshaw*, [1891] 2 Ch. 261.

being. In *Re Smith* (g), Farwell, J., stated his opinion on the result of the authorities on this section of the Act, as follows: "Every power given to trustees which enables them to deal with or affect the trust property is *prima facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being; whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *prima facie* presumption, and little regard is now paid to such minute differences as those between "my trustees," "my trustees A. and B.," and "A. and B. my trustees": the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language."

(g) [1904] 1 Ch. 139, 144.

CANADIAN NOTES.

An executor may, without the concurrence of his co-executor, sell or pledge assets of the estate to a purchaser or mortgagee in good faith, and the purchaser or mortgagee is not put upon enquiry or affected with notice because the executor is described in the transfer as "trustee." *Cumming v. Landed Credit Co.* (1893), 22 S.C.R. 246.

An executor can charge an estate in respect of a contract made by himself, only where the consideration for his promise was some contract or transaction with the testator. *Dean v. Lehberg* (1907), 6 W.L.R. 214.

Executors in Ontario must invest the moneys of the estate in Ontario, even where the testator, having foreign securities, and having appointed a foreign executor who has proved with the others, directs that his executors shall be guided, as to his foreign securities, by the judgment of his foreign executors. *Burritt v. Burritt* (1879), 27 Gr. 143.

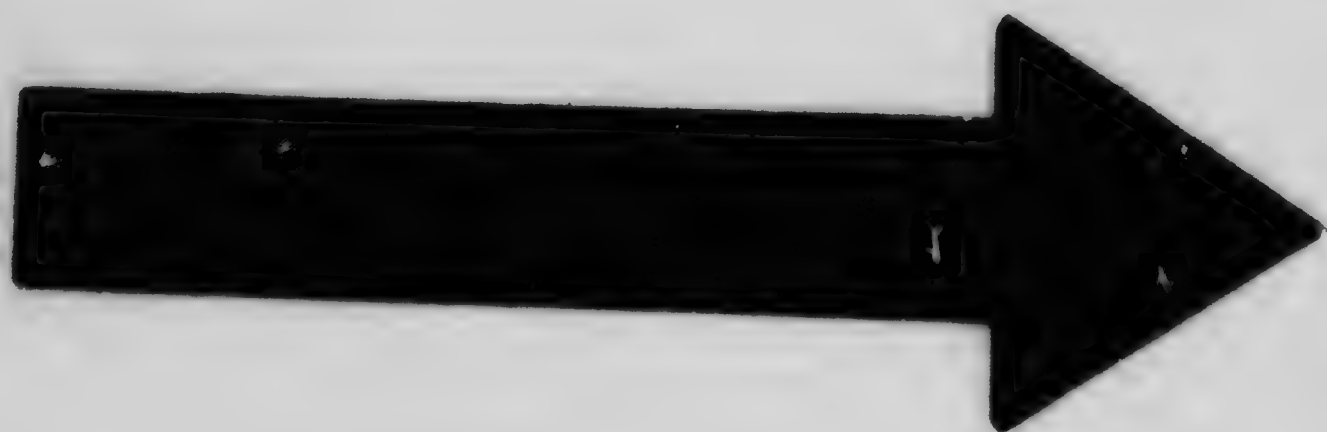
Executors who are directed to invest in public securities cannot invest in municipal debentures. *Ewart v. Gordon*, (1867), 13 Gr. 40.

Where moneys are left by will to be invested at the discretion of the executor, the discretion so given cannot be exercised otherwise than according to law and does not warrant an investment in securities not sanctioned by the Court. *Spratt v. Wilson* (1890), 19 O.R. 28.

Discretion
of executor.

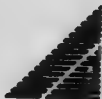
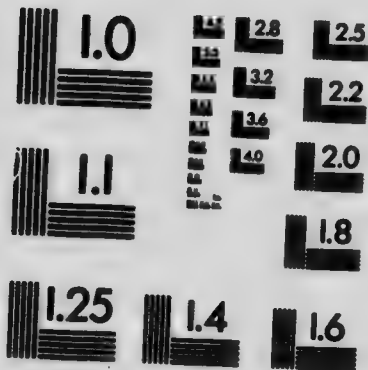
Where there was a power to sell with the consent of executors, and one executor died, the Court held the right of the survivors to exercise the power too doubtful to force the title on a purchaser. *Re MacNabb* (1882), 1 O.R. 94. But a power of sale to executors, *quâ* executors, can be exercised by a survivor. *Re Koch & Wideman* (1894), 25 O.R. 262; *Re Ford* (1879), 7 P.R. 456.

Power
of sale.



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EXECUTORS.

Power of Sale.

A power of sale given to executors, *quâ* executors, cannot be exercised by them if they renounce. *Travers v. Gustin* (1873), 20 Gr. 106.

Executors to whom a power of sale is given to be exercised within a given time, where there is a charge of debts, may sell thereafter, the limitation being directory only. *Scott v. Scott* (1858), 6 Gr. 366.

A power to sell given to executors implies a power to lease, where a devisee is entitled to the rents until sale. *Knapp v. King* (1874), 15 N.B.R. 309.

A power to sell does not authorize an exchange. *Re Confederation Life Assn. & Clarkson* (1903), 6 O.L.R. 606.

A power to executors to sell with the consent of a named person ceases on the death of that person. *Re Ford* (1879), 7 P.R. 451.

A power to sell involves a power to sell on credit, and take a mortgage for unpaid purchase money on the land sold. *Re Graham* (1889), 17 O.R. 570.

Power to
mortgage.

On a devise of lands to executors on trust to sell, charged with the payment of debts, they have power to mortgage, and the mortgagee, not having notice of non-payment of debts, gets a good title. *London & Can. L. & A. Co. v. Wallace*, (1884), 8 O.R. 539. And see *Ewart v. Gordon* (1867), 13 Gr. 40; *Nowlan v. Logie* (1859), 7 Gr. 90; *Edinburgh Life Assce. Co. v. Allen* (1871), 18 Gr. 425.

A direction that all lands unsold at the testator's death should remain in the hands of executors until they saw fit to make sale, "with full power to act . . . divesting myself of all and singular my estate . . . to them in trust to and for the fulfilment, intent and purposes of my will," was held to give the fee to the executors and not a mere power. *Patulo v. Boyington* (1854), 4 C.P. 125.

A direction that no lands shall be sold without the consent of all the executors, is a personal power to the executors, and where one only proves the will the power does not arise. *Kerr v. Leishman* (1860), 8 Gr. 435.

And a direction that legacies may be paid in land at a valuation to be fixed by the executor is personal to him, and where after such a direction the testator conveyed his land to his daughter upon trust for himself for life, and thereafter upon the trusts of his will, it was held that she could not exercise the power. *Townshend v. Brown* (1890), 22 N.S.R. 423.

Power
personal to
executor.

Where executors are given a power of sale if a devisee for life should think proper, the executors take no estate and no power until the consent is given. *Johnston v. Kraemer* (1884), 8 O.R. 193.

Where a power to sell is given to a devisee for life with the consent of executors and the executors do not prove the will, the power cannot be exercised, even where the devisee takes out letters of administration with the will annexed. *Banting v. Gummerson* (1865), 24 U.C.R. 287.

Where a testator gave full power to his executors to dispose of a residue as they should deem best, and they were to inquire as to the financial and social standing of his relatives, and make such disposition of the estate as they should think best to such relatives, it was held that there was no trust in favour of the relatives, that the executors had a power which they might exercise in their own behalf and therefore that they took beneficially. *Higginson v. Kerr* (1898), 30 O.R. 62.

Executors
taking
beneficially.

The Devolution of Estates Act (R.S.O. c. 127, s. 4), does not deprive the testator of the power to devise lands to his executors upon trusts, nor does it limit his right to give his executors special powers. Where a testator devises land to his executors upon trusts the estate, therefore, vests in them by the devise, and not by the statute, though they may resort to the statutory powers as supplementary. *Re Koch & Wideman* (1894), 25 O.R. 262; *Re Hewett & Jermyn* (1898), 29 O.R. 383; *Mercer v. Neff* (1898), 29 O.R. 680; *Re Roberts & Brooks* (1906), 11 O.L.R. 395. And therefore where land is devised to executors in trust to sell, the official guardian's consent is not necessary. *Re Booth* (1888),

Statutory
powers
merely
supple-
mentary.

16 O.R. 429. And in order to retain the fee in the executor a caution need not be registered in such a case. *Re Hewett & Germyn* (1898), 29 O.R. 383; *Mercer v. Neff* (1898), 29 O.R. 680.

So also, if in Ontario powers are given to executors they may be exercised notwithstanding the Devolution of Estates Act. If no devise is made to executors, but bare powers are given them, the statute vests the land in them, and they have both property and power while this lasts. But even if the land should shift into the beneficiaries by lapse of time, the power may still be exercised; for they stand then in the same position as if, before the Act, the land had been devised to a beneficiary, and a mere power given to the executors. See *Theobald on Wills*, 7th edition, 433b.

Imperative
devise.

A devise upon trust to convert and invest the proceeds and apply the corpus and income in a specific manner is imperative, and one which the Court will enforce, notwithstanding a subsequent clause in the will giving the executors "full discretionary power as to the mode, time, conditions of sale, amount to be paid down, etc." *Lewis v. Moore* (1897), 24 A.R. 393. Where the direction to convert is imperative the executors cannot unduly postpone conversion. *Jarvis v. Crawford* (1874), 21 Gr. 1.

A devise to two executors, one renouncing, the estate vests in the other. *Re Hewett & Germyn* (1898), 29 O.R. 383.

Where a testator by his will gave to his wife the income derivable from his real and personal estate, and directed that if this was not sufficient to supply her wants the executors might for such purpose draw upon any of his property; it was held that to supply such wants the executors were empowered to sell or mortgage the real estate. *Re Crawford* (1902), 4 O.L.R. 313.

Where the authority to sell real estate is given to the executors, the fee simple is impliedly vested in them for that purpose. *Re Roberts v. Brooks* (1906), 11 O.L.R. 395.

Personal property devised to executors for a purpose which fails, must be distributed by the executors among the

next of kin. Such distribution is within the jurisdiction of the Probate Court. *Estate of Alexander McDonald* (1853), 2 N.S.R. 123. In this case the testator left the residue of his personal property "to be disposed of by my executors, as I shall hereafter instruct them to do," but died without leaving any such instructions.

Where executors had an absolute discretion as to applying income for a particular purpose and a further discretion to apply it for the benefit of a number of charities, and in the course of many years the executors were unable to carry out the particular purpose, the Court ordered the income to be devoted to the charities or others of a like kind, considering the particular purpose as impracticable. *Atty.-Genl. v. Power* (1903), 35 N.S.R. 526; varied, 35 S.C.R. 182.

Where purpose of power is impracticable Court will act.

A declaration that it shall be lawful for executors to sell, gives a discretion not only as to the time of sale, but also as to whether there shall be a sale at all. *Rowsell v. Winstanley* (1859), 7 Gr. 141. As to discretionary power to make advances, see *Hospital for Sick Children* (1902), 3 O.L.R. 590.

An executor cannot make lands the subject of speculation or exchange the same as if they were his own. *Tenute v. Walsh* (1893), 24 O.R. 309. In that case the purpose of the exchange was not payment of debts or distribution of the estate.

An executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim against it. *Emes v. Emes*, 11 Gr. 325.

Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re C.P.R. Co. & National Club* (1893), 24 O.R. 205.

Executor may renew lease.

Where executors are given express power to sell lands whether coupled with an interest or not such power can be exercised by a surviving executor. The Devolution of Estates Act and amendments do not interfere with the express power of sale given by will to executors. *In re Koch & Wideman* (1894), 25 O.R. 262.

EXECUTORS.

Where both executors who had power of sale died, it was held that the executor of the last surviving executor had power of sale. *Re Stephenson, Kinnee v. Malloy* (1894), 24 O.R. 395.

One of several executors cannot bind the others by a *cognovit*. *Commercial Bank of Canada v. Woodruff* (1862), 21 U.C.R. 602.

Where a devisee is indebted to the estate the executor, who in Ontario takes the land by virtue of the Devolution of Estates Act, can impound the devise as a security for the debt due by the devisee. *Tillie v. Springer* (1892), 21 O.R. 585.

A devise to executors on trust to lease, but not to sell, and out of the rents to pay annuities, does not authorize a sale to pay the annuities. *Crawford v. Lundy* (1876), 23 Gr. 244.

Where executors were empowered to pay an annuity, which was made a first charge upon the real estate held in trust for testator's two children, in such proportions as the executors should decide, it was held that the apportionment made by the executors was not a judicial act and was good without notice to the parties. *Roche v. Roche* (1890), 22 N.S.R. 211. See *Re Kerr et al v. Kerr* (1884), 8 O.R. 484.

Carrying
on business.

In the absence of a direction by the testator the Court cannot make an order for executors to carry on the business of the testator. *Re Brain* (1905), 9 O.L.R. 1. The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased. *Lovell v. Gibson*, 19 Gr. 280. See *Re Nugent*, 2 W.L.R. 3.

Power to executors to carry on, with the testator's surviving partners the business of a partnership of which he was a member, does not authorize them to put more capital into the business. *Smith v. Smith*, 13 Gr. 81. See *Braun v Braun* (1902), 14 Man. R. 346.

If the proceeds of the estate be distributable by the executor, he has a power of sale by implication. *Re Daly* (1907), 39 S.C.R. 122.

An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts, which such deceased person had given to his creditors during his lifetime. *Merchants Bank v. Monteith* (1885), 10 P.R. 467.

Fraud of
testator
estops
executor.

As to the effect of a power of attorney given to an executor, see *Gore Bank v. Crooks*, 26 U.C.Q.B. 251.

Statutory Powers.

The powers of trustees and executors as to selling and mortgaging have been enlarged and defined by various provincial statutes. See R.S.O., c. 129, s. 16, s. 17, s. 19, s. 20, s. 21, s. 22, s. 23; R.S.B.C., c. 187, s. 6, s. 7, s. 9, s. 10; R.S.M., c. 170, ss. 15 *et seq.*; Ordinances, Alberta, 1903, second session, c. 11. The provisions of R.S.O., c. 129, s. 20, apply only to the case of a devise of the whole interest of the testator to the same person or persons, either as joint tenants or tenants in common, and not to several persons successively. *Re Ross & Davies* (1904), 7 O.L.R. 433.

Where a testatrix directed her executor to pay her debts and devised the land to him, his executors and administrators, (which the Court held to mean heirs and assigns), for his own use during his life, and after his decease to be divided between her children, it was held that under R.S.O., c. 129, s. 16, the devisee could mortgage the land for payment of debts. *Mercer v. Neff*, 29 O.R. 680. The powers under the foregoing section extend to any person in whom the estate devised is for the time being vested by survivorship, descent or devise, or any person appointed under the will or by the High Court to succeed to the trusteeship. R.S.O., c. 129, s. 17; R.S.B.C., c. 187, s. 7.

If a testator creates such a charge, and does not devise the land charged in such terms that his whole estate becomes vested in any trustees, the executors for the time being have the like power, and the power devolves upon and becomes

Undisposed
of lands.

vested in the person in whom the executorship is for the time being vested. R.S.O., c. 129, s. 18; R.S.B.C., c. 187, s. 8.

Where a testator charged his land and affecting to dispose of the residue, specifically devised a part thereof only, and died intestate as to the remainder, it was held that the case fell within this section as the land was undoubtedly charged, and was not devised to trustees, and that the executors could sell the undisposed of lands. *Yost v. Adams* (1885), 8 O.R. 411, 13 A.R. 129.

In Manitoba since 1st July, 1885, all lands pass to the personal representative of deceased owners thereof, in the same manner as personal estate, and the personal representative has power to dispose of the same with all the like incidents, but subject to all the like rights, equities and obligations as if the same were personal property vested in him. R.S.M., c. 48, s. 21.

In Alberta, legislation protects executors where money has been loaned by them on insufficient security, but where they acted upon what they considered a reliable report from a competent valuer. Ordinances, 1903, second sess. c. 11, s. 5.

In Alberta all lands pass to the personal representatives of the deceased owner thereof and are dealt with and distributed as personal estate. Alberta Statutes, 1906, c. 19, s. 2.

In British Columbia, by an amending Act, 1900, c. 27, the Official Administrator when appointed is the administrator of the deceased's real as well as personal estate, and becomes a trustee of the deceased's estate with the fullest powers. Section 8 gives him full power to lease, sell and convey the land of the deceased. See *Re Neilson* (1908), 3 W.L.R. 400.

Independently of the provisions of the Land Titles Act, Alberta, the whole estate, vested in a number of executors as such, vests on the death of one in the surviving executors. *Re Roueche* (1907), 7 W.L.R. 278.

As to the effect of the Land Titles Act (Canada), see *Re Galloway*, 3 Terr. L.R., Part 2, p. 88.

CHAPTER XVII.

OF THE POWER OF ONE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

Co-EXECUTORS, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all; for they have all a joint and entire authority over the whole property (*a*). Hence the receipt of one is a valid discharge (*b*), so also one of several executors may release or pay a debt or transfer any part of testator's property, without the concurrence of the other executor (*c*), and may settle an account with a person accountable to the estate (*d*).

Co-executors have joint and entire authority: acts of any one deemed to be acts of all.

As a general rule the Court will enforce an equitable security on part of the assets of a testator created by one of several executors in favour of a mortgagee for value in good faith (*e*), but on the other hand there are cases in which the Court has refused its assistance to persons seeking to enforce in equity rights claimed by virtue of what has been done by a single executor contrary to the wishes of the co-executor (*f*). Although under s. 2 of the Land Transfer Act, 1897, the powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to real estate so far as the same are applicable, yet sub-s. (2) of s. 2 provides that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

When Court may refuse its assistance to equitable assignee of one executor.

One of several joint personal representatives cannot sell or transfer real estate without authority of Court.

(*a*) Williams (10th ed.) 715.

(*b*) Charlton v. Earl of Durham, (1869) L. R. 4 Ch. 433.

(*c*) Jacomb v. Harwood, (1751) 2 Ves. Sen. 267; Cole v. Miles, (1852) 10 Hare, 179.

(*d*) Smith v. Everett, (1859) 27

Beav. 446.

(*e*) McLeod v. Drummond, (1810) 17 Ves. 152.

(*f*) Lepard v. Vernon, (1813) 2 V. & B. 51; Sneesby v. Thorne, (1855) 7 D.M. & G. 399, and see per Stirling, J., in *Re Ingham*, [1893] 1 Ch. 352, 360.

Acknowledg-
ment of debt
by one of
several execu-
tors.

An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. IV. c. 14) made by one of several executors as executor binds the testator's estate (*g*). But it may be questioned whether an acknowledgment by one only of several joint personal representatives will bind the testator's real estate (*h*).

One of several
ought not to
pay statute-
barred debt
against wish
of co-execu-
tor.

Although an executor is not bound to plead the Statute of Limitations, and may pay a statute-barred debt, yet the leaning of the Courts is against allowing him to pay such debt against the wishes of his co-executor (*i*).

Assent of one
of several to
legacy.

An assent to a legacy by one of several executors is sufficient (*k*).

When all
executors
required to
join in trans-
fer of stock.

By virtue of certain Acts of Parliament all the executors may be required to join in the transfer of stock in the books of the Bank of England (*l*), or railway shares or stock (*m*). The transfer of the share or other interest of a deceased member of a company under the Companies Act, 1862 (25 & 26 Vict. c. 89) is regulated by s. 24 of that Act, and it would seem that one of two executors who are noted as executors but not registered as shareholders may validly effect a transfer (*n*).

Act of one
executor can-
not create
new liability
on the other
personally.

Although the act of one of two executors in possessing himself of the testator's effects is the act of the other, so as to entitle him to a joint interest in possession, and a joint right of action, if the effects are afterwards taken away, yet it cannot create a new liability, and impose a charge on the other personally, and in his own individual character, which, without such act, would never have existed (*o*).

One executor
not agent of
the other to
bind him by
his several
contracts.

Moreover though one of several executors may dispose of the assets so as to bind the assets, it is not to be inferred that

(*g*) See *post*, p. 396.

(*h*) See *post*, p. 401.

(*i*) *Midgley v. Midgley*, [1893] 3 Ch. 282, and see *Astbury v. Astbury*, [1898] 2 Ch. 111, 113.

(*k*) See *post*, p. 477.

(*l*) See 33 & 34 Vict. c. 71, s. 23.

(*m*) See the Companies Clauses Act, 1845 (8 Vict. c. 16), ss. 14, 18 & 20,

and *Barton v. L. & N. W. Railway Co.*, (1889) 24 Q. B. D. 77.

(*n*) See *Buckley on the Companies Act*.

(*o*) *Williams* (10th ed.) 718, and see *post*, p. 572, with regard to a devastavit by one of several executors.

one of several executors is the agent of the others so as to bind them by his several contracts (*p*).

One of several administrators is on the same footing as regards his powers and liabilities as one of several executors (*q*).

Powers of one of several administrators.

(*p*) Williams (10th ed.) 719; Turner v. Harley, (1842) 9 M. & W. 770.
(*q*) Jacomb v. Harwood, (1751) 2

Ves. Sen. 267; Smith v. Everett, (1839) 27 B. 446; and see *post*, p. 572.

CHAPTER XVIII.

OF THE DEVOLUTION OF ASSETS AS REAL OR PERSONAL ESTATE.

SECT. 1.—Of Chattels Personal of the Deceased.

THE subject of chattels personal or things moveable, in considering whether they belong to the executor or administrator as part of the personal estate of the deceased or as annexed to the inheritance, is usually treated in three divisions (*a*), viz. : (1) chattels animate ; (2) chattels vegetable ; (3) chattels inanimate.

(1) *Chattels Animate.*

Property in
domestic
animals.

Property in
animals *feræ*
nature.

Chattels animate may be subdivided into such as are *feræ nature* and domestic animals. In domestic animals a man may have absolute property, and they are therefore capable of being transmitted, like any other personal chattel. In animals *feræ nature*, i.e., such as are usually found at liberty and wandering at large, generally speaking, a man can have no property transmissible to his representatives. But a qualified property may subsist in animals of the latter class, *per industriam hominis*, by a man reclaiming them and making them tame by art, industry or education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty ; and the animals so reclaimed or confined belong to the executor or administrator as personal property. Thus, if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators as personal property. So though they were not tame yet if they were kept alive, in any room, cage, or such like place ; as fish in a trunk. But if at any time they regain their natural liberty, the property instantly ceases,

(*a*) Williams (10th ed.) 531.

unless they have *animum revertendi*, which is only to be known by their usual custom of returning (b).

A qualified property may also subsist in animals *feræ naturæ propter impotentiam*, as in young pigeons, which, though not tame, being in the dovehouse, are not able to fly out; and they shall go to the executors or administrators as personal property (c).

The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator as personal property. Thus deer in a park (i.e., as it should seem, in a park properly so-called, which must be either by grant or prescription), conies in a warren, doves in a dovehouse, will not go to the executor or administrator as personal property. So if a man buys fish and puts them into his pond, and dies, they will go with the inheritance, because they are at liberty, but otherwise if they are in a trunk or in a net, or the like; for then they are severed from the soil (d).

Property in animals owned *ratione privilegii*.

The personal representative of a lessee for years of lands can have no further interest in deer, conies, doves and fish than the deceased had, i.e., a right to take to his own use as many as he pleases, during his term, provided he leaves enough for the stores; for if a lessee for years kill so many that there is not sufficient left for the stores, it is waste (e).

Rights of lessee thereto.

(2) *Chattels Vegetable.*

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree when severed from the body of it, or the old plant or tree itself when severed from the ground. Hence apples, pears, and other fruits, if hanging on the trees at the time of the death of the ancestor, shall go to the heir and do not pass as personal property (f).

What are chattels vegetable.

So if trees are attached to and form part of the soil they are realty—*quicquid plantatur solo solo cedit*—if they are severed

Trees if severed are personalty.

(b) See Williams (10th ed.) 531 et seq.

(c) Williams (10th ed.) 532.

(d) *Ibid.*

(e) *Ibid.* 533.

(f) *Ibid.* 534.

What amounts to severance is question of fact.

Trees sold by tenant in fee simple, or reserved on sale of the fee simple, are personal property.

Trees sold by tenant in tail must be severed before death.

Distinction between trees which are timber and such as are not.

from the soil they are personalty. The degree and extent to which a tree may form part of the soil by reason of the attachment of its roots, is in every case a question of fact. A tree may be absolutely dead and yet form part of the soil, so the question of the life of the tree seems immaterial (g).

But if the tenant in fee simple sells the trees they pass to the purchaser as personal property, and so also where the tenant in fee simple sells the land reserving the trees, in consideration of law they are divided as chattels from the freehold, and will pass as personal property to the personal representatives of the vendor (h).

Apart from powers conferred by settlement or by the Settled Land Acts, if a tenant in tail sells the trees and dies before actual severance as to the issue in tail they are part of the inheritance, and shall go with it, and the purchaser, or his personal representative, cannot take them (i).

With respect to the property in trees and bushes when severed, there seems to be a material difference between such trees as, by the general law of the land, or by the custom of the country where they grow, are timber, and such as are not. For if tenant in dower, or by the curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber trees, or a stranger does so, or the wind blows them down, the trees so severed shall not go to the tenant or to his personal representative but to the owner of the first estate of inheritance in the land. On the other hand, if such a tenant cuts down hedges or trees, not timber, or they are severed by the act of God, the tenant shall have them; and, consequently, his personal representative. So if trees are blown down, which are in their nature timber, but are dotards without any timber in them, or if such are wrongfully severed by the lessor, they belong to the tenant, and will pass to his personal representative (k).

The law is stated as follows by Sir G. Jessel, M.R., in

(g) *Re Ainslie*, (1886) 30 C. D. 485.

(h) *Williams* (10th ed.) 534.

(i) *Ibid.* 535.

(k) *Ibid.*

Honywood v. Honywood (1): "The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England; and secondly, on the special custom of a locality. By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text writer, to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even whitethorn and blackthorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and,

What is
timber:

Periodical
cutting on
timber
estates.

Trees not
timber :
right of
tenant for life
to cut.

What is
waste.

therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber."

"The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down."

"If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate of inheritance. There is in equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded with the tenant for life, to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this: that where timber is decaying, or for any special reason it is proper to cut it down, and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the Court to have it cut down, there the Court disposes of the proceeds on equitable principles, and makes

them follow the interests in the estate. In that case, therefore, the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance who can take away the money."

This judgment of Sir G. Jessel was considered by the Court of Appeal in *Dashwood v. Magniac* (*m*), and with reference to what Sir G. Jessel said about timber estates, Lindley, L.J., remarked, "If his observations are confined to estates the trees on which, though timber, may by virtue of a local usage be cut periodically when grown in woods with a view to ensure a succession of timber and to preserve such woods, I see no reason to dissent from him; but if he intended to go further, he may have gone too far." And Kay, L.J., remarked that there is no exception from the common law as to waste in favour of the limited owner of what is called a "timber estate."

Qualification
as to timber
estates.

There are, however, certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the occupier's death, yet, as between the executor or administrator of the person seised of the inheritance, and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels and will pass as such. These are usually called emblements (*n*).

Emblements,
meaning of.

When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature, and dies before harvest time, the law gives to his executors or administrators the profits of the crop, *emblavence de bled*, or emblements, to compensate for the labour and expense of tilling, manuring and sowing the land (*o*).

Obj. to
cor. ensate
for labour and
expense.

The doctrine of emblements extends not only to corn and grain of all kinds, but to every thing of an artificial and annual profit, that is, produced by labour and manurance (*p*).

To what the
doctrine of
emblements
extends.

(*m*) [1891] 3 Ch. 306.

(*o*) *Ibid.* 537

(*n*) Williams (10th ed.) 536.

(*p*) *Ibid.*

To what it
does not
extend :
fruit ;
plantations ;

growing crop
of grass,

except arti-
ficial grasses.

Extends only
to species of
crop which
repays labour
within the
year.

As to hops.

Personal re-
presentative
entitled as
against heir
but not as
against
dowress :
entitled as
against heir
in tail ;
not against
surviving
joint tenant ;
unless
deceased
sowed by
agreement ;
nor against
devisee ;

But the rule as to emblements does not apply to fruit growing on trees, nor to the plantation of trees, unless they be trees, shrubs, and other produce of the ground planted by gardeners and nurserymen by trade with an express view to sale (q).

The growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements ; because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation. It seems, however, that the artificial grasses, such as clover, saint foin and the like, by reason of the greater care and labour necessary for their production, are within the rule of emblements (r).

But the doctrine of emblements extends to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period (s).

The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule (t).

Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir : though not as against a dowress. So if the deceased was seised in fee tail, his personal representatives are entitled to the privilege as against the heir in tail. But where a man is seised of the soil as joint-tenant, and dies, the corn, &c., sown goes to the survivor, and the moiety shall not go to the personal representatives of the deceased ; yet if a joint tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his personal representatives shall have the emblements (u).

Crops growing on the land go to the devisee of the land unless expressly given by Will to some one else ; a general

(q) Williams (10th ed.) 538.

(r) *Ibid.*

(s) *Graves v. Weld*, (1833) 5 B. &

Ad. 105, 118.

(t) *Ibid.* at p. 119.

(u) Williams (10th ed.) 539.

bequest of personal estate is insufficient to deprive the devisee (*x*), but a gift of "farming stock" is sufficient to pass the growing crops to the specific legatee as against the devisee of the land (*y*).

So, if the testator, being seised in fee, sows the land, and devises it to A. for life (without any remainders over), and the testator and A. both die before severance, the executors of A. shall have the crop though A. did not sow (*z*).

devisee
for life enti-
tled against
the heir
although he
dies before
severance;
but not
against re-
maindermen.

It is otherwise if the testator has limited remainders over after the death of the life tenant. Thus if A. seised of land, sows it, and then conveys it or devises it to B. for life, remainder to C. for life, and B. dies before the corn is reaped, in this case B.'s executors shall not have the emblements, but they shall go with the land to C. (*a*).

The privilege of taking the emblements is not confined to the case of the representatives of a person seised of the inheritance, as against the heir; but the rule is general, that every one who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his personal representatives. Therefore, the personal representatives of a tenant for life are entitled to emblements to the exclusion of the remainderman or reversioner (*b*). So the personal representatives of a man, seised in right of his wife, who sows and dies before severance, are entitled to emblements (*c*). And if tenant for years, *si tamdiu vixerit*, sows and dies before severance his personal representatives are entitled (*d*).

Rule extends
to everyone
possessed of
an uncertain
estate dying
before sever-
ance.

Sect. 1 of 14 & 15 Vict. c. 25, provides that, where the lease of "any farm or lands" shall determine by the death or cesser of the estate of any landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the tenant shall continue to hold such farm or lands until the expiration of the then current year of his tenancy,

Effect of 14
& 15 Vict.
c. 25, s. 1, on
determina-
tion of lease
by death of
landlord.

(*x*) Cooper v. Woolfitt, (1857) 2 H. & N. 122.

(*y*) *Re* Roose, (1880) 17 C. D. 696.

(*z*) Williams (10th ed.) 540.

(*a*) *Ibid.* 542.

(*b*) *Ibid.* 541.

(*c*) *Ibid.* 543.

(*d*) *Ibid.* 542.

and shall then quit upon the terms of his lease, as if it had expired by effluxion of time or otherwise; and the succeeding landlord shall be entitled to recover and receive of the tenant a fair proportion of the rent, for the period since the lessor's death or cesser of estate.

This Act applies to any tenancy in respect of which there may be a claim to emblements, for instance a cottage with about an acre of land partly cultivated as a garden and partly sown with corn and planted with potatoes (e).

Rule does not apply where tenancy determines by man's own act.

The general rule of law is, that the tenant shall not have emblements when the tenancy is determined by his own act; as where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeiture, condition broken, &c. (f). The act on which the lease is forfeited for condition broken need not be the sole and distinct act of the tenant alone; it is sufficient if it is the consequence of his act, as for instance forfeiture on judgment and execution or on bankruptcy in consequence of a previous debt of the tenant (g).

Right of egress and regress.

Where there is a right to emblements, the law gives a free entry, egress and regress, as much as is necessary, in order to cut and carry them away (h). But in justifying for entering or continuing in possession the claimant must show that the crop was ripe or fit for harvesting or that it needed care or cultivation (i).

Compensation under Agricultural Holdings (England) Act, 1883.

Besides emblements a tenant (that is a holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year) on quitting his holding at the determination of a tenancy is entitled under the Agricultural Holdings (England) Act, 1883 (k), to obtain from his landlord compensation for improvements made on his holding in accordance with the provisions of the Act, and the right to

(e) *Haines v. Welch*, (1868) L. R. 4 C. P. 91.

(f) *Williams* (10th ed.) 543, n. (g); and *cf. Leschallas v. Woolf*, [1908] 1 Ch. 641.

(g) *Davis v. Eyton*, (1830) 7 Bing.

154.

(k) *Williams* (10th ed.) 544; *Kingsbury v. Collins*, (1827) 4 Bing. 202.

(i) *Hayling v. Okey*, (1853) 8 Exch. 531, 545.

(k) 46 & 47 Vict. c. 61.

receive such compensation enures for the benefit of his personal representatives (s. 61). So also the personal representatives of a landlord, tenant for life, who have been compelled under the Act to pay compensation for improvements to an outgoing tenant, who had claimed compensation and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid (*l*).

(3) *Chattels Personal Inanimate.*

The meaning of the term "heirlooms" is stated as follows by Chitty, L.J., in *Hill v. Hill* (*m*). "The meaning of the word standing alone, without any explanatory context, in reference to chattels in gross (I am not speaking of fixtures) is the same in law and in equity. Its primary meaning is chattels which on the death of the ancestor pass to the heir. These are of two classes. The first is where they pass by special custom, such as the best bed and the like. The second is where the chattels, to use the old phrase, savour of the inheritance; that is, are directly connected with it. This class includes title-deeds and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage as in the case of the Pusey horn, and the ancient jewels of the Crown.

Heirlooms.

Primary meaning.

"As the special custom has to be proved strictly, little or nothing is heard at the present day of the first class. For this statement of the law it is unnecessary to cite authorities. I refer, however, to Co. Litt. 18 b, and 1 Williams on Executors (9th ed.), p. 633 *et seq.*, in which latter work the subject is fully treated. But there is a secondary sense in which the term 'heirlooms' is used; that is, where chattels are settled by deed or Will or otherwise, vesting them in trustees upon trusts declared whereby they are limited to go along with corporeal or incorporeal hereditaments, so far as the rules of law or equity will permit. This secondary sense is, speaking generally, the sense in which the term 'heirlooms'

Secondary meaning.

(*l*) *Gough v. Gough*, [1891] 2 Q. B. 665. (*m*) [1897] 1 Q. B. 483, 494.

is employed popularly, and also by lawyers as a brief description. As an instance of the latter, I refer to the 37th section of the Settled Land Act, 1882, where the marginal note (which forms no part of the enactment) is 'heirlooms.' The word itself does not occur in the text, which speaks of personal chattels settled on trust so as to devolve with land. But the chattels thus settled are both at law and in equity still chattels; and, as neither law nor equity knows of such a thing as an estate in a chattel or a remainder in the proper sense of those artificial terms, it follows that the chattels so settled, retaining their character of chattels, are, like any other personal property, subject to the general rule against perpetuities. Accordingly, in compliance with this rule, the property in the chattels must vest absolutely within lives in being and twenty-one years afterwards. Consequently, in well-drawn settlements, regard being had to another rule of law that words which create an estate tail in realty confer the absolute property in personalty, a provision is usually inserted that the chattels shall not vest in an unborn person who takes an estate tail in the realty by purchase unless he attains the age of twenty-one years. All these propositions are well established: I am led into stating them by the argument for the defendant. There is another proposition of law, that a man cannot change the general law, and impart to a chattel a descendible quality, except in some such manner as already stated. He cannot turn a chattel into freehold land. Accordingly, if A. gives a chattel to B. and merely says that B. is to have it as an heirloom, no force (in the absence of any context or special circumstance) can be attributed to the word 'heirloom.' Such was the opinion of Lord Hatherley in *Shelley v. Shelley* (n) and such was the decision in *In re Johnston* (o).

Heirlooms cannot be devised away from the house to which they belong, but during his life the owner may sell or dispose of them, as he may of the timber of the estate (p).

It has been held that the ornaments of the chapel of a

Settled
chattels sub-
ject to rule
against per-
petuities:
cannot be
entailed;

cannot be
imparted with
descendible
quality like
freehold.

Power of dis-
position.

Ornaments of
bishop's
chapel.

(n) (1868) L. R. 6 Eq. 540.

(o) (1884) 26 C. D. 538.

(p) Williams (10th ed.) 546.

preceding bishop belong to the succeeding bishop, although other chattels in the case of a sole corporation belong to the executors of the deceased (q).

If an incumbent enter upon a parsonage house in which are hangings, grates, iron backs to chimneys and such like, not put up there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but they shall continue in the nature of heirlooms; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture, or household goods, and shall go to his executor (r).

Fixtures in parsonage house.

Fixtures.—The meaning of the word fixture is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim "*Quicquid plantatur solo solo cedit*" (s). There is no exception to this rule. There is, however, a different and a separate rule that whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which is called waste. The two rules stand consistently together, not one by way of exception to the other, but to this second rule, namely, the irremovability of things fixed to the inheritance an exception has been established in favour of fixtures which have been attached to the inheritance for the purpose of trade. Fixtures of this kind cannot be removed by the executor of one who was complete owner of the inheritance, but they can be removed by the executor of a tenant, or by the tenant himself as against the landlord during the course of the tenancy (t).

What are fixtures.

Irremovability of fixtures by limited owner.

Exception in case of trade fixtures.

There is a similar exception in favour of tenant's fixtures annexed for domestic convenience or ornament.

Exception in case of fixtures for domestic convenience or ornament.

(q) *Corven v. Pym*, (1604) 12 Rep. Cas. 762, 772, per Ld. Chelmsford.

(r) *Williams* (10th ed.) 551.

(t) *Ibid.*, see per Ld. Cairns, at pp. 767, 768.

(s) *Bain v. Brand*, (1876) 1 App.

Trade and tenant's fixtures are "things which are annexed to the land for the purposes of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration" (u).

Trade fixtures pass by conveyance of the land by the owner of them.

It was stated by Blackburn, J., in *Holland v. Hodgson* (v), that "since the decision of *Climie v. Wood* (x) it must be considered as settled law (except, perhaps, in the House of Lords) that what are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land he has a right, as against the freeholder, to sever the fixtures from the land, yet if he be a mortgagor in fee he has no such right as against his mortgagee." In *Ellis v. Glorer & Hobson, Ltd.* (y), however, it was held that a mortgagor in possession has the right to permit trade fixtures to be put up, and may have, by implication, in the absence of stipulation to the contrary, the right to remove them from the mortgaged premises, provided they are removed before the mortgagee takes possession, but this right of removal ceases when possession is taken by the mortgagee.

Effect of bargain between the affixers:
Hire-purchase agreements.

The case of *Hobson v. Gorringe* (z) raised the question whether a mortgagee of land in fee, when he enters upon the mortgaged premises, can take possession of an engine which is attached to the soil thereof by means of bolts and screws, although the engine did not and never had belonged to the mortgagor, but to a third party under a hiring and purchase agreement with the mortgagor. It was held that although a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession,

(u) *Holland v. Hodgson*, (1872) L. R. 7 C. P. 328, per Blackburn, J., at p. 333; and see *Leschallas v. Woolf*, [1908] 1 Ch. 641, 652.

(v) *Ubi sup.*

(x) (1869) L. R. 4 Exch. 328.

(y) [1908] 1 K. B. 388.

(z) [1897] 1 Ch. 182, 188.

yet a *de facto* fixture does not become not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers.

It makes no difference that the mortgagor was a lessee for ninety-nine years and not owner in fee. So held in *Reynolds v. Ashby & Son, Ltd. (a)*, a case in other respects similar to and following *Hobson v. Gorrings* and in which Collins, M.R., remarked that the facts with regard to the hire purchase agreement did not appear to be any evidence to rebut the presumption arising from such an annexation to the freehold. The case of *Reynolds v. Ashby & Son, Ltd.*, was affirmed by the House of Lords (b), and Lord Lindley said: "The purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the buildings as a factory. . . . The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question would not in my opinion be open to the slightest doubt. There is a long series of decisions of the highest authority showing conclusively that as between a mortgagor and a mortgagee machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land. . . . I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is in my opinion impossible to hold that the machines did not pass with the mortgage" (c).

But as between the equitable interest of the hirer of machinery under a hire-purchase agreement and the interest

(a) [1903] 1 K. B. 87.

(b) [1904] A. C. 466.

(c) See also *Crossley Brothers, Ltd. v. Lee*, [1908] 1 K. B. 86, where it

was held that an engine let out under a hire-purchase agreement being a fixture was therefore not distrainable for rent.

What constitutes annexation.

created by an equitable mortgage the ordinary principles of priorities apply (*d*).

There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, *viz.*, the degree of annexation and the object of the annexation. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel (*e*).

In *Leigh v. Taylor* (*f*), where valuable tapestries had been affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels, Lord Halsbury, L.C., in his speech makes the following observations: "One principle, I think, has been established from the earliest period of the law down to the present time, namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear, namely, that where it is something which, although it may be attached in some form or another (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the

(*d*) *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575.

(*e*) *Per Blackburn, J.*, in *Holland v.*

Hodgson, ubi sup., at pp. 334, 335.

(*f*) [1902] A. C. 157.

purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor. . . . It is all very well to say that there is a difference between the cases of an heir and an executor on the one hand, and a landlord and a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation, and you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question, whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things. . . . My own view is that, going back for some centuries, the real differences of opinion which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to-day as it was in the early times, and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir." And Lord Macnaghten observed (g): "The question is still as it always was, Has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not

(g) At p. 162.

always the most important—and its relative importance is probably not what it was in ruder or simpler times.”

But in *Reynolds v. Ashby & Son, Ltd.* (h), Collins, M.R., remarked that when the decision of *In re De Falke* affirmed in *Leigh v. Taylor* comes to be looked at it appears to decide, not that the tapestries there in question remained mere movable chattels, but that they were fixtures in the sense of things which, though attached to the freehold, were removable as between a tenant for life and a remainderman.

It is, however, submitted that this is not the correct view of the decision of the House of Lords in *Leigh v. Taylor*, and that the latter case laid down the principle for ascertaining when a chattel, though attached, is not to be treated as forming part of the realty, that is not a fixture at all but a mere movable chattel. The case of *Reynolds v. Ashby & Son, Ltd.* was a case relating to trade fixtures whereas *Leigh v. Taylor* was not a case relating to trade or tenant's fixtures, but chattels affixed for ornament by a limited owner.

In *Re Sir Edward Hulse, Bart.* (i), the question arose as between tenant for life and remainderman whether certain machinery affixed to a steam-mill and which the tenant for life had purchased from the lessee of the mill on the expiration of the tenancy belonged to the executrix of the tenant for life or the remainderman, and Buckley, J., in deciding in favour of the executrix observes in his judgment: “The old maxim ‘*Quicquid plantatur solo solo cedit*’ was as between tenant and landlord long since relaxed for the benefit of trade. It was advantageous that the tenant should be at liberty, for the purposes of his trade, to affix chattels to the soil, and in his case there was established an exception by which he was entitled to remove the fixtures during the term. As between tenant for life and remainderman the same principle is applicable. It is advantageous that the tenant for life should be in such a position as to be able to improve the estate for his own enjoyment without being thereby compelled to make

(h) [1903] 1 K. B. 87, 100.

(i) [1905] 1 Ch. 406, 410.

a present to the remainderman. . . . In *Leigh v. Taylor* (k) (being the title of *Ward v. Taylor* (l) on appeal to the House of Lords) the question being, as I have said, between tenant for life and remainderman, the learned Lords treated the question as one to be determined, not so much by an investigation of the physical means used for the attachment, as of the purpose for which and of the intention of the person by whom the chattels were attached. The question is, not what is the nature of the attachment of the chattel to the soil, but what, having regard to all the facts of the case must have been the intention of the tenant for life. It is upon these principles, I think, that this case has to be decided. The question has been argued whether the true principle is that where the tenant fixes chattels to the freehold with the right to remove them during his term, that right is an exception which enables him to remove part of the freehold, or an exception by which the chattels do not become part of the freehold. It appears to me that the exception is an exception to the maxim '*Quicquid plantatur solo solo cedit*.' It is not that the law allows the tenant for years to remove part of the freehold, but that the chattels have not become part of the freehold. 'The exception makes them no part of the freehold.'

In the case of trade and tenant's fixtures it is difficult to reconcile the latter part of this statement with the exception to the second rule laid down by Lord Cairns in *Bain v. Brand* (m) and the judgment of Blackburn, J., in *Holland v. Hodgson* (n).

In *Re Whaley* (o), where the question arose between the devisee in fee of a house and the personal representative of the residuary legatee as to a picture and tapestry forming part of a general scheme of decoration of a room in the house, Neville, J., considered there was no reason to attribute to the testator an intention that the picture and tapestry should not pass with the house, and that different considerations arose in the case of a tenant for life or years fixing such things to the wall.

(k) [1902] A. C. 157.

(l) [1901] 1 Ch. 523, 530.

(m) *Ante*, p. 237.

(n) *Ante*, p. 238.

(o) [1908] 1 Ch. 615.

The principle, stated shortly, to be gathered from the cases is, it is submitted, that in deciding whether a chattel affixed is or is not a fixture depends on the circumstances and intention, but that trade fixtures, and tenant's fixtures annexed for the purposes of domestic convenience or ornament, may be removed in any case, except as against a mortgagee.

Agricultural
Holdings
Acts.

Attention should here be drawn to the Act 14 & 15 Vict. c. 25, s. 8, giving the landlord the right to purchase tenant's buildings and fixtures erected on farms and enabling the tenant to remove them up to the time the landlord elects to purchase; also to the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 84, whereby under certain circumstances provided by the Act the landlord has a right to purchase any engine, machinery, fencing or other fixture and buildings, which otherwise would remain the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy; and to the Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 8 (1), which extends the provisions of s. 84 of the Act of 1883 to every fixture or building affixed or erected by the tenant to or upon a market garden for the purposes of his trade or business of a market gardener.

SECT. 2.—*Of the distinction between Freeholds and Chattels Real of the Deceased.*

Estate of
freehold
defined.

An estate of freehold may be defined to be an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or for some uncertain interest, created by Will, or by some mode of conveyance capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person (*p*).

Thus not only a term for one's own life, or for the life of another, is deemed a freehold, but if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays

(*p*) Watkins' Principles of Conveyancing (9th ed.), p. 65, note by Morley and Coote.

£10, &c., or until the grantee be promoted to a benefice, or till A. makes B. bailiff of his manor, or for any like uncertain time, in all these cases the grantee has an estate of freehold (q).

On the other hand, all interests for a shorter period than a life, or more properly speaking, for a definite space of time, measured by years, months, or days, are deemed chattel interests or personal property (r).

Leasehold interest defined.

An estate limited to A. and his assigns during the life of B. is a freehold interest, but an estate limited to A. and his assigns for a term of years if B. shall so long live is a leasehold interest (s).

An interest which in its nature is a chattel real cannot be rendered transmissible to heirs (t). For instance, if a lease for years is given to A. and his heirs, or to A. and the heirs of his body and for default of such issue to B., in either case A. takes the property absolutely and it is transmissible as personal estate (u).

A chattel real cannot be made transmissible to heirs.

A bequest of personal property to a man for life, and afterwards to the heirs of his body is an absolute bequest to the first taker; for whatever disposition would amount to an estate tail in land, gives the whole interest in personal estate, which is incapable of being entailed (x). This rule, however, must be applied with great care and with due regard to the context (y). If there appears any other circumstance or clause in the Will to show the intention that the words "heirs" or "heirs of the body" should be words of purchase, and not words of limitation, then the ancestor will take for life only, and his heir will take by purchase (z).

Personal property cannot be entailed.

SECT. 3.—Of Annuities which do or do not descend to the Heir.

An annuity which is derived out of, and depends on, a freehold interest, will on intestacy be transmissible and belong

Annuity derived out of freehold interest.

- | | |
|---|--|
| (q) Williams (10th ed.) 512. | 73, 78. |
| (r) 1 Preston on Estates, 203. | (y) See Smith v. Butcher, (1878) 10 C. D. 113; <i>Re Bishop and Richardson's Contract</i> , [1899] 1 I. R. 71; Hawkins on Wills, p. 188. |
| (s) Williams (10th ed.) 512. | |
| (t) Preston on Abstracts of Title, (1823) vol. 1, p. 447. | (z) Williams (10th ed.) 515, 866, n. (n); and see <i>post</i> , p. 415. |
| (u) Williams (10th ed.) 514. | |
| (x) Elton v. Eason, (1812) 19 Ves. | |

Annuity
derived out
of chattel
interest.

Personal
annuity
limited to
heirs.

Annuity
cannot be
entailed.

Personal
annuities in
fee unaffected
by Land
Transfer Act,
1897.

Effect of
Wills Act,
1837.

to heirs. But every annuity granted out of a chattel interest will be a chattel interest although it be limited to the grantee and his heirs for a life or lives (a).

Yet a personal annuity, not concerning land, if granted with words of inheritance, will descend to the heir; but it passes as personal estate if words of inheritance are not used in the grant (b).

An annuity, however, cannot be entailed, consequently where it is limited to a man and the heirs of his body, he takes a fee simple conditional, which becomes absolute on the birth of issue (c).

Personal annuities in fee, being personal estate, are not affected by s. 1 (1) of the Land Transfer Act, 1897.

SECT. 4.—*Estates pur autre vie.*

With respect to estates *pur autre vie* of any deceased person, who shall not have died before the 1st January, 1838, the Wills Act, 1837 (1 Vict. c. 26), after repealing the sections of the statutes of 29 Car. II. c. 8, and 14 Geo. II. c. 20, dealing with such estates, and enacting, by s. 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, proceeds to enact, by s. 6, that "if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same

(a) Preston on Abstracts of , ed.) 622.
(1823) vol. 1, p. 446; *Re* ,
[1904] 1 Ch. 111, 726.

(b) Lord Stafford v. Buckley, (1750)
2 Ves. Sen. 170, 178; Williams (10th

(c) Turner v. Turner, (1783) 1 Bro.
C. C. 325; *Re* Sir J. Rivett-Carnac's
Will, (1885) 30 C. D. 136, 141.

shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

The terms of the last conveyance of an estate *pur autre vie* and not the original grant must be looked to in order to ascertain whether it is to go to the heir as special occupant or to the legal personal representative (*d*). So where an equitable estate *pur autre vie* limited to a testator, his heirs and assigns, was devised by him, as his freehold hereditaments, to trustees, their heirs and assigns, for the use of A., it was held that, on A.'s intestacy, though the entire estate passed to A., there was nothing on the face of the Will to entitle his heir to claim as special occupant, and that the estate passed to his administrator under s. 6 of the Wills Act (*e*).

Last conveyance and not original grant determines whether estate goes to special occupant or to personal representative.

SECT. 5.—*The Right of next Presentation to a Church.*

If the church becomes vacant and the owner of the advowson dies before presenting, the right of presentation belongs to the personal representative of the deceased patron as personal property and does not go to the heir (*f*).

Right of presentation personal estate of deceased patron :

It is the same where the person is seised of the advowson in a politic capacity, as prebendary. But in the case of a bishop dying during a vacancy the King presents by reason of his custody of the temporalities (*g*).

so if patron was prebendary :
but on death of bishop King presents.

If the patron, whether a natural or a politic person, grant the next presentation and the grantee dies before avoidance it goes to his personal representative as personal property, for it is a chattel real till a vacancy happens, and afterwards the vacancy turns it into a chattel personal (*h*).

Death of grantee before avoidance.

If the incumbent be also seised in fee of the advowson and dies intestate, his heir and not his personal representative shall present (*i*).

Death of incumbent owner in fee of advowson.

(*d*) *Earl of Mountcashell v. More-Smyth*, [1896] A. C. 158, 165.

(*e*) *Re Inman*, [1903] 1 Ch. 241 ; see also *Re Sheppard*, [1897] 2 Ch. 67.

(*f*) *Williams* (10th ed.) 509.

(*g*) *Ibid.*, 510.

(*h*) *Ibid.*, 509, 510.

(*i*) *Ibid.*, 510.

EXECUTORS.

Death of
patron of
donative
benefice.

During
vacancy of
parsonage.

Election of
Ordinary
where clerk
presented by
testator and
not admitted.

If a person seized of the advowson of a donative benefice dies during a vacancy, the right of donation descends to the heir, differing from a presentative benefice in this respect (*k*).

So if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage and not the executor of the deceased person shall present (*l*).

If the testator presents and, his clerk not being admitted before his death, his executors present their clerk, the Ordinary is at his election which clerk he will receive (*m*).

SECT. 6.—Of Shares in Public Companies.

Generally,
shares in com-
panies are
personal
estate.

Shares in the navigation of the River Avon, in the Bath Navigation, and in the New River, were held to be real property, being an inheritance arising out of land (*n*), but it is now usual when Acts of Parliament are obtained for making navigable canals and similar works to provide that the shares shall be deemed to be personal estate.

With regard to shares in companies, whether corporate or unincorporate, a shareholder as such has no right of interference with the property, he has no right to enter upon the lands of the company or claim any portion of the real estate for his private purposes, he has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted, and on his death this right passes to his personal representative as personal estate (*o*).

Sect. 22 of the Companies Act, 1862 (25 & 26 Vict. c. 89), expressly provides that shares in any company under that Act shall be personal estate.

Express pro-
vision in Com-
panies Act,
1862.

SECT. 7.—Of Estates held as Security.

Estates by statute merchant, statute staple and by *elegit*, the possessors of which are said to hold their lands as free-

(*k*) Williams (10th ed.) 511.

(*l*) *Ibid.*

(*m*) *Ibid.*

(*n*) *Ibid.* 624, and cases cited.

(*o*) Myers v. Perigal, (1852) 2 De G. M. & G. 599; Ashworth v. Munn, (1880) 15 C. D. 363, 375.

Estate by
statute mer-
chant, statute
staple or
elegit is a
chattel
interest.

hold, are securities for the payment of debts, and will go to the personal representative as a chattel interest (*p*).

Formerly, although the legal estate in freehold land held in mortgage descended to the heir, yet in equity the money due upon the mortgage was to be paid to the legal personal representative of the mortgagor, and the heir of the mortgagee was a trustee of the land for the legal personal representative (*q*).

Freehold land held in mortgage.

Formerly heir trustee for personal representative.

Now, in cases of death after the 31st December, 1881, s. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that estates vested by way of mortgage in any person solely shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives, or representative from time to time, in like manner as if the same were a chattel real vesting in them or him. But s. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), however, excludes the application of s. 30 of the Conveyancing and Law of Property Act, 1881, to land of copyhold or customary tenure vested in the tenants on the court rolls.

Now mortgage estates devolve on personal representative:

except land of copyhold or customary tenure.

As between the heir-at-law and the next-of-kin of a deceased person, *prima facie* they are respectively bound by the condition of the property at the time of the deceased's death.

Quality of estate fixed at death.

So where a mortgage deed contains a power of sale with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate (*r*). The same principle applies even where at the time of sale the mortgagor was a lunatic and so continued until his death. Moreover it is immaterial whether the mortgage deed provides that the surplus proceeds of sale should be paid to the mortgagor, "his executors or administrators," or to the mortgagor, "his heirs or assigns" (*s*).

On sale by mortgagee before equity of redemption has descended surplus proceeds are personal estate.

Secus, if sale is after death of mortgagor.

(*p*) Williams (10th ed.) 513.

Hare, 35.

(*q*) *Ibid.*, 518.

(*r*) *Re Grange*, [1907] 1 Ch. 313;

(*r*) *Wright v. Rose*, (1825) 2 Sim. & St. 323; *Bourne v. Bourne*, (1842) 2

[1907] 2 Ch. 20.

Foreclosure or statutory bar of mortgagor after mortgagee's death does not affect rights of representatives of mortgagee.

So where a mortgagee dies entitled to a mortgage interest, that is personal estate at that time; and though afterwards the mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real (t). Consequently the widow of the mortgagee, under such circumstances, would not be entitled to dower out of the mortgaged property (u).

Again where a mortgagee of freeholds enters into possession of the mortgage land, and dies, leaving all his property to his widow for life, but otherwise intestate, and the possession is continued by the widow until the equity of redemption is barred by the Real Property Limitation Act, 1874, the mortgaged land passes as personalty to his next-of-kin (x).

But from time rights of mortgagor are barred interest of next-of-kin is realty.

But as from the time when the rights of the mortgagor become barred the right of the next-of-kin of the mortgagee is to the land. Without any election what was previously personalty becomes realty by the operation of the Act. It makes no difference that the parties interested are two, and therefore on the death of one of two next-of-kin after the mortgagor had become barred the one-half share of the land in which he had become beneficially interested as realty was held to descend to his heir-at-law (y).

SECT. 8.—Of Merger.

Definition of merger.

Instances of merger :
chattel interests;
estates for life;
estates tail and determinable fees.

Merger is an act of law by which on the union of two estates in one and the same person, without any intermediate estate, the less is extinguished in the greater (z). For instance, a term of years will merge in the immediate reversion, whether it be a chattel interest or an estate of freehold (a), and so also an estate for life will merge in a greater estate immediately expectant upon it (b). But an estate tail will not become merged in the immediate reversion in fee simple, since such merger would defeat the object of the statute *De Donis*,

(t) Att.-Gen. v. Vigor, (1803) 8 Ves. 256, 277.

(u) Flack v. Longmate, (1845) 8 Beav. 420, 421.

(x) *Re Loveridge*, [1902] 2 Ch. 859.

(y) *Re Loveridge*, [1904] 1 Ch. 518.

(z) See Preston's Conveyancing (3rd ed.), vol. 3.

(a) Burton's Comp. (6th ed.), p. 361.

(b) *Ibid.*, p. 300.

which was to render estates tail inalienable (c). Determinable fees, or estates tail after possibility of issue extinct, might merge at common law (d), but now by s. 89 of the Fines and Recoveries Act, 1888 (8 & 4 Will. IV. c. 74), a base fee when united with the immediate reversion is enlarged instead of being merged.

Formerly if the reversion, where rent was incident, became merged in a superior reversion, as in the case of an underlease on the superior lease becoming merged in the fee, the rent as well as the reversion was destroyed, but now, by 8 & 9 Vict. c. 106, s. 9, on surrender or merger of a reversion expectant on a lease the next estate is to be deemed the reversion.

Destruction
of rent by
merger of
reversion.

Prior to the Act 7 & 8 Vict. c. 76, s. 8, the destruction of contingent remainders might have been effected by the merger of the particular estate, but by that Act they will be converted if in a Will, into executory devises, and, if in a deed, into executory limitations, in the nature and having the properties of executory devises (e). Further by the Act 40 & 41 Vict. c. 38, a contingent remainder may in certain cases have effect as a springing or shifting use or executory devise or other executory limitation. The general rule is that when limitations can take effect as remainders they are not to be treated as executory devises, and the application of this rule may be of great importance, as for instance where the limitations as executory devises would be void for remoteness (f). Equitable contingent remainders were not subject to be defeated by reason of the absence of a sufficient freehold to support them, and they do not become so liable by subsequently becoming clothed with the legal estate (g).

Destruction
of contingent
remainders by
merger of the
particular
estate

Where equitable and legal estates, equal and co-extensive, unite in the same person, the former merges in the latter (h). And where a term would merge by its union with the inheritance in the same person, if he has in the one the legal and in

Merger of
equitable in
legal estate :
attendant
and satisfied
terms.

(c) 1 Cr. Tit. II. ch. 1, s. 51.

(d) Preston's Conveyancing (3rd ed.), vol. 3, p. 240.

(e) See Watkins' Conveyancing (9th ed.), p. 197.

(f) *Re Wrightson*, [1904] 2 Ch. 95.

(g) *Re Freme*, [1891] 3 Ch. 167.

(h) *Selby v. Alston*, (1797) 3 Ves.

1177.

the other the equitable estate, the term will attend the inheritance (i), and since the Act 8 & 9 Vict. c. 112, where a satisfied term attends the inheritance it is thereby made to cease, except so far as it may afford protection against incumbrances, or other claims, for instance dower (k).

Equity does not follow the law on questions of merger.

Court of Equity guided by intention.

Instances:
tenant for life acquiring beneficial lease;

owner of estate paying charges.

Upon the subject of merger a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged (l). The principle by which the Court of Equity is guided is the intention; and in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates become vested (m).

For instance, if a tenant for life in remainder takes a beneficial lease, or an agreement therefor, and subsequently becomes tenant for life in possession, the presumption is against merger in equity (n).

Again when the owner of an estate pays charges on the estate, which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot (o).

Where it is for the benefit of the freeholder that his beneficial interest in a charge should merge there is nothing to prevent its extinguishment; as for instance, where an owner of freehold land, who was liable under covenant for the security of the land for portions charged thereon, became entitled to an unraised portion as next-of-kin to an intestate

(i) *Capel v. Girdler*, (1804) 9 Ves. 509.

(k) *Anderson v. Pignet*, (1872) L. R. 8 Ch. 180.

(l) *Forbes v. Moffat*, (1811) 18 Ves. 384, 390.

(m) *Lewin on Trusts* (10th ed.), p. 589; and see per *Farwell, J.*, in

Ingle v. Vaughan-Jenkins, [1900] 2 Ch. 368, 370; and *Williams* (10th ed.) 519.

(n) *Ingle v. Vaughan-Jenkins*, *ubi sup.*

(o) *Thorne v. Cann*, [1895] A. C. 11, 18, per *Ld. Macnaghten*.

portioner and died without taking out administration to the portioner's estate, since it would have been for the landowner's benefit to merge the charge, thereby reducing the liability on the covenant, it was held that the landowner's beneficial interest in the charge subject to the liabilities (if any) of the portioner's estate, had merged in the land (p).

But in equity, in order that there may be a merger the two estates which are supposed to coalesce must be vested in the same person at the same time and in the same right; for instance, where a father had a life interest in trust funds under his marriage settlement and became entitled as administrator and next-of-kin of a deceased son to a reversionary interest in the same trust funds, it was held that, inasmuch as the father's life interest and the son's reversion were held by the father in different rights, there was no merger, and that so long as the father's life interest subsisted the fund ought to remain in the hands of the trustees of the settlement, but that on the father executing a surrender of his life interest he was entitled to have the fund transferred to him (q).

The two estates must be vested in the same person, at the same time, and in the same right.

The Judicature Act, 1873, s. 25 (4) provides that "There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Judicature Act, 1873, s. 25 (4).

SECT. 9.—Of the Doctrine of Equitable Conversion.

A testator cannot by a mere direction in his Will that for the purposes of transmission his real estate shall be impressed with the quality of personalty from the time of his death, or *vice versa*, alter the legal devolution of property (r).

Legal devolution cannot be altered by mere direction by Will.

It is however an established doctrine in Courts of Equity that things shall be considered as actually done which ought to have been done. On this principle money directed to be employed in the purchase of land, and land directed to be sold

Equity considers as done what ought to have been done.

(p) *Re French-Brewster's Settlements*, [1904] 1 Ch. 713.

(q) *Re Radcliffe*, [1892] 1 Ch. 227.

(r) *Hyett v. Meekin*, (1884) 25 C. D. 735, 738.

Money directed for purchase of land or land directed to be sold to be considered as so converted.

Person claiming the property must take it in the character the instrument has impressed upon it.

Person absolutely entitled in either form may elect.

and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by Will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed (*s*).

Every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it; and its devolution and disposition will be governed by the rules applicable to that species of property (*t*). Hence, where freehold property is, by the doctrine of equitable conversion, to be considered as personalty, on an intestacy it becomes distributable among next-of-kin, and a Will disposing of it was, prior to the Land Transfer Act, 1897, entitled to probate, and it was liable to probate and legacy duty (*u*). So money covenanted to be laid out in land descends as land (*x*).

But anybody entitled to take in either form may elect that, instead of its being converted into money, or instead of its being converted into land, it shall remain in the form in which it is actually found. The only question in each particular case is whether there have been acts sufficient to enable the Court to say that the party has so determined (*y*).

Money being once clearly impressed with real uses as land, will remain so impressed for the benefit of the heir, until put an end to either by the money being at home, by coming to the possession of the person who would be entitled to the land when purchased, or, if it is in the hands of a third person, by some act of the absolute owner showing an election to take it as money (*z*).

(*s*) *Fletcher v. Ashburner*, (1779) 1 Bro. C. C. 497, 499; and see *Williams* (10th ed.) 495 *et seq.*

(*t*) *Williams* (10th ed.) 496.

(*u*) *In the Goods of Gunn*, (1884) 9 P. D. 242.

(*x*) *Edwards v. Countess of War-*

wick, (1723) 2 P. Wms. 171.

(*y*) *Harcourt v. Seymour*, (1551) 2 Sim. (N. S.) 12, 45; *Re Lord Grimthorpe*, [1908] 1 Ch. 666.

(*z*) *Wheldale v. Partridge*, (1803) 8 Ves. 235; *Re Pedder's Settlement*, (1854) 5 D. M. & G. 890.

Slight evidence is sufficient to show an intention to retain the property in the form in which it is actually found. For instance, remaining in possession and receiving the rents for nine years without taking any steps to have the estate sold was held sufficient (a); but where real estate, given upon trust for sale, was subject to an option to a tenant under a lease to purchase the reversion, that was considered sufficient reason why no steps had been taken to convert, and receipt of rent under those circumstances was held not to be evidence of a reconversion (b).

Slight evidence sufficient to show intention to retain property in form in which it is.

To effect a reconversion there must be the concurrence of the absolute owners. There cannot be a reconversion if one of the parties has only a limited or defeasible interest (c). So where money was liable to be invested in land to be settled to uses in strict settlement and all the uses were exhausted except a legal jointure, it was held that as the jointress had an equity to compel the investment of the money in land, by reason of the bargain that she should have a legal rent charge on freehold estate, the land must be treated as real estate as between the real and personal representatives of the person who, subject to the jointure, was entitled thereto (d). But it would seem that it would be otherwise as to portioners (e).

To effect reconversion there must be concurrence of absolute owners.

A man entitled to the proceeds of sale of an estate in a contingent event may elect that if that event happens he will have the land itself instead of the money. He cannot do anything to interfere with the interests of third parties, but subject to this his election made while his interest is contingent is just as binding when the contingency happens as if it were given afterwards (f).

A man entitled contingently may elect contingently.

Equitable conversion is a conversion for the purposes of the Will and does not affect the rights of the persons who die

Equitable conversion only for purposes of the Will.

(a) *Re Gordon*, (1877) 6 C. D. 531. In *Kirkham v. Miles*, (1807) 13 Ves. 338, two years' possession was held to be too short to presume an election.

(b) *Re Lewis*, (1885) 30 C. D. 654. See other cases in *Williams* (10th ed.) 496, n. (b).

(c) *Sisson v. Giles*, (1863) 3 De G. J.

& 8. 614; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, 312.

(d) *Walrond v. Rosalyn*, (1879) 11 C. D. 640.

(e) *Ibid.*

(f) *Meek v. Devenish*, (1877) 6 C. D. 566, 572.

by law independent of the Will. If, therefore, there is a trust to sell real estate for the purposes of the Will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next-of-kin (g).

On partial failure heir or next-of-kin claiming undisposed of interest takes it in character the instrument has impressed upon it.

Where real estate is devised upon trust for conversion into personalty to be held upon trusts which in the result partially fail the proceeds of the land sold and the land (if any) unsold both result to the heir as personal estate (h).

On the other hand where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next-of-kin as real estate (i).

If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of the personal estate. On the other hand, if the next-of-kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate (k). The title of his heir-at-law or next-of-kin, as the case may be, is fixed at his death (l).

If there is a total failure of the objects for which the conversion was to be made, the property will devolve as if no conversion had been directed (m).

The testator may, however, by his Will, change the nature of his real estate, to all intents and purposes, by disposing of

On total failure property devolves as if no direction made.

Testator may by Will preclude all questions.

(g) *Ackroyd v. Smithson*, (1779) 1 Bro. C. C. 503; *Curteis v. Wormald*, (1878) 10 C. D. 172, 175.

(h) *Re Richerson*, [1892] 1 Ch. 379.

(i) *Curteis v. Wormald*, *ubi sup.*

(k) *Curteis v. Wormald*, *ubi sup.* See also per *Ld. Westbury* in *Becton v. Hodgson*, (1864) 10 H. L. C. 656.

(l) *Re Richerson*, *ubi sup.*

(m) *Ibid.*, p. 382.

it so as to preclude all questions between his real and personal representative, after his death (u). But in order to exclude the heir, it is not enough that the testator shows an intention that his real estate should be treated as money after his death; it must also be apparent that he meant it to be treated as if he had himself actually converted it into personal estate before his death, and therefore as personal estate for all intents and purposes, whether the purposes of the Will take effect or not, and not merely for the purposes of his Will (v). The mere intention to exclude the heir however explicit will be void, unless there is a gift to some one else (p).

What sufficient indication to exclude heir.

The above principles apply to a mixed fund of real and personal estate directed to be converted where there is a partial failure of the disposition by the death of some of the residuary legatees in the lifetime of the testator. So far as the lapsed shares are constituted of personal estate they go to the next-of-kin, and so far as they are constituted of real estate, to the heir-at-law (q).

Same principles apply to partial failure of disposition of a mixed fund.

Where there is a general direction to pay legacies out of a mixed fund, as where real and personal estates are given upon trust for sale and the legacies are directed to be paid out of the proceeds, the legacies are payable *pro rata* out of the real and personal estate in the event of the ultimate residue being undisposed of (r).

Legacies payable *pro rata*.

A question may arise in a Will in which there is a direction for the conversion of real estate and also a residuary bequest whether the surplus proceeds pass to the residuary legatee. This will depend on the meaning to be derived from the consideration of the whole context of the particular Will which has to be construed. If the term "residuary legatee" is found standing alone, above all, if it is found in a Will which

When residuary legatee entitled.

(u) *Johnson v. Woods*, (1840) 2 Beav. 409; *Taylor v. Taylor*, (1853) 3 De G. M. & G. 190.

(v) See *Williams* (10th ed.) 500, and *Fitch v. Weber*, (1848) 6 Ha. 145, 148.

(p) *Fitch v. Weber*, *ubi sup.*, at

E.

p. 152.

(q) *Ackroyd v. Smithson*, *ubi sup.*

(r) *Allan v. Gott*, (1872) L. R. 7 Ch. 439; *Re Spencer Cooper*, [1908] 1 Ch. 130.

appears to make a division between real property and personal property, the *prima facie* meaning of "residuary legatee" would be the person taking what the law calls the residue of the personal property; but it is a term which must be fashioned and moulded by the context, and if you have a context in which the testator is found looking at his landed property not as land but as something which is all to be sold and turned into money, then the term "residuary legatee" becomes a term as applicable to the proceeds of landed property as it would have been in the first instance to personal property (s).

Effect of
valid contract
for sale of
real estate.

The doctrine of constructive conversion also applies to a valid contract for sale of real estate. There being a valid contract it converts the estate in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the purchaser (t). The vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid in the absence of express contract as to the time of delivering possession.

Effect of can-
cellation of
contract after
death of
vendor.

If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; but if the contract is cancelled because there was some equitable ground for setting it aside, there will not be conversion, because there never was in equity a valid contract. To be a valid contract it must not only be binding on both parties, but the vendor must be in a position to make a title according

What is a
valid con-
tract.

(s) Per *Ld. Cairns* in *Singleton v. Tomlinson*, (1878) 3 App. Cas. 404, 417. For a summary of the rules of construction for determining whether conversion is directed for all the purposes of the Will, and the title of the

residuary devisee or residuary legatee, see *Theobald on Wills* (7th ed.), p. 255 *et seq.*

(t) *Lysaght v. Edwards*, (1876) 2 C. D. 499, 506, 507

to the contract, unless the purchaser has accepted the title in the lifetime of the vendor (*u*).

If the contract for sale be valid at the death of the vendor, but the purchaser loses his right to a specific performance by subsequent laches, the estate belongs to the next-of-kin and not to the heir-at-law (*x*). Effect of failure of purchaser to perform contract.

If a man specifically devises real estate and afterwards sells it, although the purchase is not completed until after his death, or the money is allowed to remain on mortgage of the property, neither the purchase-money nor the sum secured by the mortgage passes to the specific devisee (*y*). Specific devise adeemed by contract for sale by testator.

Where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, the exercise of the option causes it to relate back to the original agreement, that is the time of the creation of the option (*z*), although the heir or devisee will be entitled after the vendor's death to the rents up to the time the option is exercised (*a*). Relation back on exercise of option to original purchase.

The principle applies even though the option to purchase is not to be exercised until after the death of the grantor, and it is immaterial whether the grantor of the option dies testate or intestate (*b*).

But this doctrine would seem not to be consistent with the general principles applicable to cases of conversion, and has never been applied except as between the real and the personal representatives of the original creator of the option, and is not to be extended. Consequently, where an option to purchase was given by lease to the lessee, and under the terms of the lease the lessor covenanted to insure against fire, on the buildings being destroyed by fire before the exercise of the option, it was held that the subsequent exercise of the option would not cause it to relate back to the time of the creation of Doctrine only applies as between real and personal representatives of original creator of option.

(*x*) *Lysaght v. Edwards*, *ubi sup.* 506.

(*x*) *Curre v. Bowyer*, (1818) 5 Beav. 6, note (*b*).

(*y*) *Farrar v. Earl of Winterton*, (1842) 5 Beav. 1; *Moor v. Raisbeck*, (1841) 12 Sim. 123; *Re Clowes*, [1893]

1 Ch. 214.

(*z*) *Lawes v. Bennett*, (1785) 1 Cox, 167.

(*a*) *Townley v. Bedwell*, (1808) 14 Ves. 590.

(*b*) *Re Isaacs*, [1894] 3 Ch. 506.

the option in such manner as to render the property for this purpose property of the purchaser as from the date of the lease giving the option, and the vendor trustee of the insurance money for the purchaser; since until the exercise of the option there being no specific performance of the contract possible, there is no conversion, and the principle of equity which considers that done which ought to be done and which the Court can compel to be done, extends so far back as those circumstances exist and no farther (c).

Option in lease to purchase fee simple.

An option to the lessee to purchase the fee simple contained in a lease is an integral part of the lease and passes with it to the personal representative of the deceased lessee, and if exercised by the personal representative of the deceased lessee no equitable interest in real estate descends to the heir (d).

Inference from devise after contract giving option.

The testator may, however, sufficiently indicate an intention that the rule shall not apply. When you find, that, in a Will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it (e). The same inference will be drawn where the testator executed a codicil on the same day that he granted a lease of the specifically devised property with an option of purchase to the lessee (f). But the case is very different when, after having given the property by Will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away (g).

Order for sale of real estate in administration action.

If the Court, in the exercise of its jurisdiction, in an

(c) *Edwards v. West*, (1878) 7 C. D. 858. The mere fact of making a contract for purchase and sale does not pass any interest in a subsisting fire policy, there must be a bargain with regard to the policy in order to pass the interest: *Rayner v. Preston*, (1881) 18 C. D. 1.

(d) *Re Adams and Kensington Vestry*, (1883) 24 C. D. 199, (C. A.) 27 C. D. 394: and see *post*. p. 272.

(e) Per Page Wood, V.-C., in *Weeding v. Weeding*. (1861) 1 J. & H. 424, 481.

(f) *Re Pyle*, [1895] 1 Ch. 724.

(g) *Weeding v. Weeding*, *ubi sup.*

administration action, makes an order for sale of land, it operates as a conversion from the date of the order and before any sale has taken place (*h*).

So where the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty (*i*).

Order for sale of infant's real estate.

By the Lunacy Act, 1890 (53 Vict. c. 5), s. 117, the judge may order any property of a lunatic to be sold, charged, mortgaged, dealt with or disposed of as he thinks most expedient for the purpose of raising or securing money to be or which has been applied for the purposes mentioned in the Act, and s. 123 (1) provides that the lunatic, his heirs, executors, administrators, next-of-kin, devisees, legatees and assigns shall have the same interest in any moneys arising under the powers of the Act which may not have been applied under such powers as he or they would have had in the property if no sale, mortgage or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of.

Order for sale or mortgage of lunatic's property under 53 Vict. c. 5.

Sect. 118 authorises the judge to order that money expended on permanent improvements shall be a charge upon the improved property or any other property of the lunatic (*k*).

Money spent on permanent improvements of lunatic's property may be made a charge. Rights of heir and next-of-kin of lunatic apart from Act.

Apart from this Act, should the judge in lunacy make any order by which the nature of one part of the lunatic's estate should be altered for the improvement of the other, there is no equity between the heir-at-law and next-of-kin on the lunatic's death to have the nature of the property restored (*l*).

Where, however, there is an order for sale of a competent part of real estate for a limited purpose, as, for instance, for payment of an infant's share of costs in administration or

Order for sale for limited purpose.

(*h*) *Hyett v. Meekin*, (1884) 25 C. D. 735. Same principle applies under an order for sale of timber: *Dyer v. Dyer*, (1865) 34 Beav. 504; *Hartley v. Pen-darves*, [1901] 2 Ch. 498.

(*i*) *Wallace v. Greenwood*, (1880) 16 C. D. 362, 365, per *Jewel*, M.R.

(*k*) The principles which guide the Court in making orders under this section were considered in *Re Gist*, [1904] 1 Ch. 398.

(*l*) See *Williams* (10th ed.) 505; and see *ante*, p. 249.

other proceedings, or of the mortgage debt and interest in a foreclosure action, any surplus proceeds in excess of what is required will descend as real estate, so long as such proceeds remain in Court, or no act has been done by the party entitled to take the same as money (*m*).

On a sale under compulsory powers.

When property is taken under the compulsory powers of an Act of Parliament, a notice given to an owner in fee who dies before steps are taken to ascertain the amount of compensation, although the company has been let into possession, will not effect a conversion, since no contract had been entered into in the owner's lifetime which could be specifically enforced (*n*); but a conversion takes place when the amount of the purchase money is agreed upon by the surveyors, although there is no contract in writing (*o*).

Distinction between s. 69 and s. 76 of 8 Vict. c. 18 as to purchase money.

Purchase money payable to parties under disability and paid into Court under s. 69 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18) is liable to be reinvested in the purchase of other lands, and is, therefore, impressed with the quality of real estate, and there is a constructive reconversion until some person becomes absolutely entitled to the money to his or her own use; but if paid in under s. 76 of the Act, by reason of the owner of the land refusing to accept the money, or failing to make out a title, or to convey, or for other reasons mentioned in that section, the money is applicable under s. 78 and is personal estate (*p*).

SECT. 10.—Of Partnership Assets.

All partnership property impressed with character of personality.

All property of what nature soever bought with the cash and for the purposes of a trading partnership concern, must in equity be looked upon as personal, unless there be an agreement to the contrary (*q*). So also if land, whether acquired by

(*m*) *Scott v. Scott*, (1882) 9 L. R. Ir. 367; *Burgess v. Booth*, [1908] W. N. 83.

(*n*) *Righton v. Righton*, (1866) 36 L. J. Ch. 61.

(*o*) *Re Hawkins*, (1843) 13 Sim. 569; *Watts v. Watts*, (1873) L. R. 17 Eq.

217.

(*p*) *Re Harrop*, (1857) 3 Drewry, 726; *Kelland v. Fulford*, (1877) 6 C. D. 491.

(*q*) *Smith's Mercantile Law* (10th ed.) 181.

descent or devised, is appropriated to partnership purposes and is involved in the business, it becomes part of the partnership property, and the share of a deceased partner is personal estate^(r), and there can be no survivorship in it in equity, although the property was conveyed to the partners as joint tenants^(s). In the case of partnership property land can be remitted to its original character only by virtue of such an agreement made between the partners as withdraws the land from the partnership assets^(t).

CANADIAN NOTES.

Where a testator had sown a quantity of grain, which **Emblements.** was in the ground after his decease, one of the next of kin sought to charge the executors with the value thereof, but the land on which it was having been devised to the widow for life, it was held on appeal that she, and not the executors was entitled to the emblements. *Cudney v. Cudney* (1874), 21 Gr. 153. See *Cameron v. Gibson*, 17 O.R. 233.

A bequest of a testator's chattels in general terms and "Chattels." unaffected by any context will carry all the personal estate. *Re McMillan* (1902), 4 O.L.R. 515, but where a distinction is made between chattels and other personalty by the will itself, the word "chattels" will be given a restricted construction. *Peterson v. Kerr*, 25 Gr. 583. See also *Davidson v. Boomer*, 15 Gr. 1, and *Holmes v. Walker*, 26 Gr. 228.

The effect of the Devolution of Estates Act (Ontario) and amendments acted upon by the registration of a caution under an order of a county Judge after the twelve months has expired is to place lands of a testator again under the power of his executors so that they can sell them to satisfy

^(r) *Waterer v. Waterer*, (1873) C. D. 813.

L. R. 15 Eq. 402.

^(t) *Att.-Gen. v. Hubbuck*, (1884)

^(s) *Davies v. Games*, (1879) 12 13 Q. B. D. 275.

EXECUTORS.

debts, and the expression "in the hands" of executors as applied to property of the testator is satisfied if it is under their control or saleable at their instance. *Ianson v. Clyde* '900), 31 O.R. 579.

The goods of the deceased husband exempt from seizure under the Execution Act (Ontario) are not, except as to funeral and testamentary expenses, assets in the hands of the husband's executors for the payment of debts. *In re Tatham*, 2 O.L.R. 343.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life and not the executor then becomes liable for them to the person entitled in remainder. *In re Munsie* (1884), 10 P.R. 98.

"Good will"
is asset of
estate.

The good will of a business may be the subject of a sale by a personal representative and the contract enforced, where the price has been agreed upon, or any other means of fixing its value provided, and such good will is therefore an asset of the estate of the intestate, to be accounted for in the ordinary course of administration. *Christie v. Clarke* (1866), 16 C.P. 544.

In Ontario and Manitoba upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seized in fee simple, such hereditament shall vest in the legal personal representative, from time to time of such trustee. R.S.O., c. 129, s. 7; R.S.M., c. 170, s. 10.

A bequest of a testator's chattels in general terms will carry all the personal estate, including a mortgage, (*Re McMillan*, 4 O.L.R. 415) but where a distinction is made between chattels and other personalty by the will itself, the word "chattels" will be restricted to such tangible and move-

able articles as furniture, farm implements, etc. *Peterson v. Kerr*, 25 Gr. 583. See *Holmes v. Walker* (1879), 26 Gr. 228.

By the Devolution of Estates Act (Ontario) the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts. R.S.O., c. 127, s. 7. Residuary
devise.

In order that this section may apply there must be both realty and personalty in the residue. Thus, where a testator bequeathed all his personal estate to his son, and devised to him a farm, and devised the remainder of his real estate to his executors upon trusts, and directed his debts to be paid out of his "estate," it was held that the debts should be paid out of personalty as far as it was sufficient. *Re Moody* (1906), 12 O.L.R. 10.

Apart from this enactment the Devolution of Estates Act has not made any change in the order of administration of assets. *Scott v. Supple* (1893), 23 O.R. 393.

Although by force of the Devolution of Estates Act (Ontario) all real estate of the deceased devolves upon his personal representative, yet where infants are interested in the real estate no sale or conveyance shall be valid under the Act without the written consent or approval of the official guardian or in the absence of such consent or approval without an order of the High Court. R.S.O., c. 127, s. 8. Such consent is, however, not necessary where the land is devised to the executors in trust to sell. *Re Booth's Trusts* (1889), 16 O.R. 429; *Re Koch & Wideman* (1895), 25 O.R. 262. As to the effect of the Devolution of Estates Act, in transmitting into a trust, a charge created by the testator, which, however,

did not in terms expressly vest the estate in any trustee. See *Yost v. Adams* (1886), 13 A.R. 129.

The operation of a devise of lands is by the Devolution of Estates Act only postponed for the purposes of administration. The estate does not pass through the medium of the executors but by the operation of the devise. *Ianson v. Clyde* (1900), 31 O.R. 579.

The Devolution of Estates Act, R.S.O., c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts, but except in the case of a residuary devise specially provided for by section 7, the order in which different classes of property are applicable to the payment of debts has not been changed by the Act. *Re Hopkins Estate* (1901), 32 O.R. 315.

For recent amendments to the Devolution of Estates Act, see Ontario Statutes (1902), c. 17, and 1906, c. 1.

**Power of
executors.**

The testatrix in the first part of her will gave her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife and their three children, "to be divided and shared equally between them." She then proceeded: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture . . . but the real estate if I have not disposed of it shall be sold and equally divided, and I appoint my stepson . . . and his daughter . . . to execute this my will. Held, that the right of the executors to sell the real estate of the testatrix was not affected by the Devolution of Estates Act, but that, independently of that

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Act the executors had, upon the true construction of the will, an express power to sell the real estate. *Re Roberts v. Brooks* (1906), 11 O.L.R. 395.

A bequest of promissory notes upon which, after making his will, the testator has recovered judgment which was unsatisfied at the time of his death, does not pass the notes. *Wetmore v. Ketchum* (1862), 10 N.B.R. 408.

CHAPTER XIX.

OF CHRONES IN ACTION.

SECT. 1.—Of Rights accrued in the Lifetime of the Testator or Intestate.

(1) *Ex contractu.*

Rights founded on contract or duty survive to personal representative.

Contracts founded on personal considerations do not survive unless otherwise agreed,

e. g., principal and agent, master and servant, author and publisher, master and apprentice.

RIGHTS of action founded upon any obligation, contract, debt, covenant or other duty, including a statutory duty to the deceased (*a*), survive to the personal representative of the deceased in whom the right was vested (*b*). And the executor or administrator need not be named in the terms of the contract, in order to transmit to him the right of enforcing it (*c*).

Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent (*d*), and master and servant (*e*), the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. So also an agreement to compose a work is discharged by the death of the author (*f*). And in the absence of special agreement the interest of the master in an apprenticeship being an interest coupled with a personal trust cannot be assigned and is determined by his death (*g*); and on the death of the master an action is not maintainable by an apprentice or pupil for the recovery of any part of the premium paid under the indenture by the apprentice or pupil to

(*a*) *Peebles v. The Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159; *Darlington v. Roscoe & Sons*, [1907] 1 K. B. 219.

(*b*) See *Williams* (10th ed.) 604.

(*c*) *Williams* (10th ed.) 605.

(*d*) *Campanari v. Woodburn*, (1854) 15 C. B. 400.

(*e*) *Farrow v. Wilson*, (1869) L. R. 4 C. P. 744, 746.

(*f*) *Marshall v. Broadhurst*,

(1831) 1 Tyrw. 348, 349, per *Ld. Lyndhurst*, and as to the personal nature of a publishing agreement see *Stevens v. Benning*, (1854) 1 K. & J. 168, aff. 6 D. M. & G. 223; *Hole v. Bradbury*, (1879) 12 C. D. 886; *Griffith v. Tower Publishing Co., Ltd. and Moncrieff*, [1897] 1 Ch. 21.

(*g*) *Williams* (10th ed.) 626.

the master, there being in such case only a partial failure of consideration (*h*).

The law relating to parish apprentices is regulated by Stat. 32 Geo. III. c. 57.

Rights of parish apprentices regulated by 32 Geo. III. c. 57.

An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party (*i*).

An action for an account was given to executors by 18 Edw. I. stat. 1, c. 23; to executors of executors by 25 Edw. III. stat. 5, c. 5; and to administrators by 31 Edw. III. stat. 1, c. 11.

Action for account, origin of.

(2) *Ex delicto*.

It was a principle of the common law, that if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done (*k*).

At common law.

But by the Stat. 4 Edw. III. c. 7, *de bonis asportatis in vita testatoris*, which reciting, that in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be should have had if they were living. And this remedy is further extended to executors of executors, by 25 Edw. III. stat. 5, c. 5, and to administrators by an equitable construction of the former statute. The Act 4 Edw. III. being a remedial law, has always been expounded largely; and though it makes use of the word trespasses only, has been extended to other cases within the meaning and intent of the statute. Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury

Effect of statutes of Edw. III. as to injury to personal estate.

(*h*) Whincup v. Hughes, (1871) L. R. 6 C. P. 78; Ferns v. Carr, (1885) 23 C. D. 409; *Re Thompson*, (1848) 1

Ex. 864.

(*i*) Williams (10th ed.) 621.

(*k*) *Ibid.*, 606.

done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased might have had, whatever the form of action may be (*l*).

These statutes do not extend to injuries to the person or the freehold of deceased.

But the statute of Edw. III. does not extend to injuries done to the person or to the freehold of the testator. Therefore an executor or administrator shall not have actions of assault or battery, false imprisonment, libel, slander, deceit, nor (unless by virtue of the stat. 3 & 4 Will. IV. c. 42, s. 2, hereafter to be mentioned) for diverting a watercourse, obstructing lights, or other actions of the like kind; for such causes of action still die with the testator (*m*).

An action for defamation either of private character or of a person in relation to his trade comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement causing damage to the plaintiff's personal estate, as for instance slander of title to the plaintiff's trade mark, survives (*n*). So also an action for breach of promise of marriage does not survive unless special damage to the property of the promisee, arising from and within the contemplation of both parties at the date of the promise, can be proved (*o*). But there is no decision which supports the proposition that because in consequence of injury done to the person the person injured is put to expense the case is brought within the category of cases to which the statute of Edw. III. applies; for instance the personal representative cannot sue, in respect of damage to the deceased's estate, for medical expenses or loss of occupation arising from the tortious injury to the deceased's person (*p*).

Jurisdiction over money paid into Court in action before death.

Notwithstanding an action is at an end by reason of the death of the plaintiff or defendant and cannot be revived, if money has been paid into Court, the Court has jurisdiction on

(*l*) Williams (10th ed.) 606, and see *Twycross v. Grant*, (1878) 4 C. P. D. 40.

(*m*) Williams (10th ed.) 608, and see *Twycross v. Grant*, *ubi sup.*

(*n*) *Hatchard v. Mege*, (1887) 18 Q.

B. D. 771.

(*o*) *Finlay v. Chirney*, (1888) 20 Q. B. D. 494.

(*p*) *Pulling v. The Great Eastern Railway Co.*, (1882) 9 Q. B. D. 110.

the application of the personal representatives of the deceased party to order the money to be paid out to them on showing such grounds as the deceased would have had to show if he had been alive and the action was still in existence (q).

By stat. 3 & 4 Will. IV. c. 42, s. 2, after reciting that no remedy is provided by law for injuries to the real estate of any person deceased committed in his lifetime, it is enacted, "that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person."

Effect of 3 & 4 Will. IV. c. 42, as to injury to real estate.

Injury must be within six months before death, and action must be brought within one year after.

It may here be mentioned that damages recovered by personal action in respect of injury to land do not accrue to the inheritance, but are the personal estate of the person who recovered them, and who being tenant for life, they belong to him or his personal representative and not to the heir or administrator (r).

The Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), enacts: "That whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Effect of the Fatal Accidents Act, 1846.

By s. 2: "Every such action shall be for the benefit of the

(q) *Brown v. Feeney*, [1906] 1 K. B. 363; *Maxwell v. Viscount Wolsley*, [1907] 1 K. B. 274.

(r) *Noble v. Cass*, (1828) 2 Sim. 343.

wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

By s. 8: "Not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person" (s).

An action can only be maintained by the representative of a deceased person under this Act where that person could, if alive, have himself maintained an action in respect of his injuries against the defendant (t).

A father cannot recover, either at common law or under the Act, the funeral expenses of burying an unmarried infant daughter (u).

By the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 1, if it shall happen that no such action as is mentioned in the Act 9 & 10 Vict. c. 93 shall within six calendar months after the death have been brought by the executor or administrator, such action may be brought by and in the name of the persons for whose benefit such action would have been, if it had been brought by and in the name of the executor or administrator.

An action by the personal representative under the Act is no bar to an action by the same person in respect of the assets and estate of the deceased, and an admission on the record made in the one action cannot be treated as an estoppel of

Fatal Accidents Act, 1864, enables action, if not brought by executor or administrator, to be brought in names of persons for whose benefit it is.

Action under the Act no bar to subsequent action by representatives in respect of the estate of deceased.

(s) See Williams (10th ed.) 612 *et seq.*, for cases decided on this Act.

(t) Williams v. Mersey Docks and

Harbour Board, [1905] 1 K. B. 804.

(u) Clark v. London General Omnibus Co., [1906] 2 K. B. 648.

which either party can take advantage of, for, although the machinery nominally is the same, the entire object and effect of the actions are different, and they are brought in different rights; the personal representative in a case under the Act does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the deceased's death is to be made the subject of an action just as if he had lived (r).

The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), enacts that where personal injury is caused to a workman in any of the various ways mentioned in s. 1, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Effect of the
Employers'
Liability
Act, 1880.

Sect. 2 enumerates cases in which the workman shall not be entitled to any right of compensation or remedy under the Act.

Sect. 3 limits the amount of compensation recoverable under the Act.

And s. 4 provides that an action under the Act shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: provided that, in case of death, the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

By s. 5 money payable under any penalty is to be deducted from compensation awarded.

Sect. 6 assigns the trial of actions under the Act to the County Court, subject to removal into the superior Court.

The Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58) (which repealed the Workmen's Compensation Acts, 1897 and 1900), makes further provision (s. 1) for the liability of certain

Effect of the
Workmen's
Compensation
Act, 1897.

(r) *Leggott v. Great Northern Railway Co.*, (1876) 1 Q. B. D. 599.

employers to workmen as defined by the Act suffering personal injury by accident arising out of and in the course of their employment. By s. 18 any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable. If not settled by agreement the amount of compensation under the Act, where death results from the injury, is subject to the scale and conditions of compensation provided by the first schedule to the Act, and it is thereby provided that the payment in the case of death shall, unless otherwise ordered as thereafter provided, be paid into the County Court, and any sum so paid into Court shall, subject to rules of Court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the Court in such manner as the Court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act, and the receipt of the registrar of the Court shall be a sufficient discharge in respect of the amount paid in: Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependants, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due.

By s. 2 (1) proceedings for recovery of compensation shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death.

Where a claim is made by a sole dependant of a deceased workman, as for instance his widow, and the dependant dies before any award is made in respect of the claim the right to compensation survives and passes to the legal personal representative of the deceased dependant (x).

(x) *Darlington v. Roscoe & Sons*, [1907] 1 K. B. 219.

Sect. 1 (2) (b) of the Act of 1908 provides that: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid" (y).

(8) *Contracts connected with Land.*

With respect to contracts relating to the freehold, a covenant which runs with the land will go to the heir, not only without naming him, but where it is made with the covenantee and his executors (z). Moreover, the covenantee need not be made a party to the deed of covenant (a). And although such a covenant has been broken in the lifetime of the testator, or intestate, if the substantial damage, as, for instance, eviction, has taken place since his death, the real representative and not the personal, is the proper plaintiff. But when the ultimate damage is sustained in the lifetime of the ancestor, as where he is evicted, and the land, and consequently the covenant, does not descend to the heir, there the personal representative only can sue upon the covenant (b). The case of *Kingdon v. Nottle* (c), upon a covenant for title, and *King v. Jones* (d), upon a covenant for further assurance, are authorities to show that these covenants are continuing covenants, and the breaches of then continuing

Covenants running with the land descend to the heir.

unless ultimate damage is sustained in ancestor's lifetime.

(y) See *Rouse v. Dixon*, [1904] 2 K. B. 628, as to a claim made and withdrawn being no bar to subsequent action.

(z) See *Williams* (10th ed.) 619, and cases referred to. For an explanation of the distinction between covenants running with the land and covenants merely collateral, see *Dewarr Goodman*,

[1907] 1 K. B. 612; [1908] 1 K. B. 94.

(a) *Forster v. Elvet Colliery Co., Ltd.*, [1908] 1 K. B. 629.

(b) *King v. Jones*, (1814) 5 Taunt. 418; aff. 4 M. & S. 188, and see *Williams* (10th ed.) 619 *et seq.*

(c) (1813) 1 M. & S. 355; (1815) 4 M. & S. 53.

(d) *Ubi sup.*

breaches, and that a right of action accrues *toties quoties* when and as often as damage actually arises from the breach of either covenant (e).

Effect of
32 Hen. VIII.
c. 34, relating
to actions by
or against
grantees of
reversions.

The stat. 32 Hen. VIII. c. 34, expressly enabled grantees of reversions to take advantage of conditions and covenants against lessees, their executors, administrators and assigns, of the same lands, and also gave to lessees, their executors, administrators and assigns, the like remedy against the grantees of the reversions which they might have had against the grantors (f).

The statute extends to a grantee or assignee of part of a reversion, and rent is apportionable in such case, and a fair proportion may be claimed (g).

Effect of the
Land Transfer
Act, 1897.

Since the Land Transfer Act, 1897, on the death of the owner of a reversion in real estate within the Act, his executor or administrator is the only party capable of suing on a covenant made with the lessor until assent or conveyance under s. 8 (1) of the Act.

Collateral
covenants.

A covenant in an underlease by the underlessor to perform the covenants in the superior lease relating to premises not demised by the underlease does not run with the land, and is only a collateral covenant, and a covenant to indemnify is only personal (h).

Option in
lease to the
lessee to
purchase the
fee simple.

Although an option contained in a lease to the lessee to purchase the fee simple of the land demised forms an integral part of the lease and passes with it to the personal representative of the lessee as personal estate, with the right to enforce it if he should think it beneficial, and under it no equitable interest in real estate descends to the heir (i), yet such an option given by way of proviso or covenant in a lease does not come within the stat. 32 Hen. VIII. c. 34, so as to make the liability to perform it run with the reversion, and consequently an

(e) *Spoor v. Green*, (1874) L. R. 9 Ex. 99, 117, per Kelly, C.B.

(f) See notes on this Act in Chitty's Statutes.

(g) *Mayor of Swansea v. Thomas*, (1882) 10 Q. B. D. 48.

(h) *Dewar v. Goodman*, [1907] 1 K. B. 612.

(i) *In re Adams and Kensington Vestry*, (1883) 24 C. D. 199; 27 C. D. 394.

action by an assignee of the lease against assigns of the lessor cannot be maintained to compel a conveyance (*k*).

An option must not exceed the limit allowed by the rule against perpetuities (*l*).

Sect. 10 (1) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that “(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee’s part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of the reversionary estate, and shall be capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased.”

Effect of the Conveyancing Act, 1881, s. 10, as to rent reserved by lease, and benefit of lessee’s covenants, and of condition of re-entry.

Sect. 11 (1) provides that “The obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.”

Sect. 11, as to obligation of lessor’s covenants.

These sections apply only to leases made after the commencement of the Act (*m*).

(*k*) *Woodall v. Clifton*, [1905] 2 Ch. 257.

(*l*) *Ibid.*

(*m*) As to the law previously see

Wolstenholme on The Conveyancing and Settled Land Acts; Challis R. P. (2nd ed.).

(4) *Of Rent and Arrearages.*

Different
kinds of
rents.

At common
law power of
distress only
attaches to
rent-service.

At common law there are three kinds of rents: rent-service, rent-charge, and rent-seck (n).

Rent-service is where the rent accrues in connection with a tenure, whether by reason of the owner of the rent having the reversion of the land out of which it issues or having the mere seignior, and to this rent there is attached a common law power of distress.

A rent-charge is where the owner of the rent has neither seignior, nor reversion, but by express contract is entitled to distrain.

A rent-seck is where the owner of the rent has neither seignior nor reversion, nor any express power of distress.

Rents of assize, chief rents and quit rents are customary rents under which tenants of a manor hold under the lord from time immemorial.

A fee farm rent is where an estate in fee is granted subject to a rent in fee, which, if created since the Statute of *Quia Emptores*, cannot be a rent-service and must be either a rent-seck or rent-charge.

Statutory
power to
distrain.
27 Hen. VIII.
c. 10.

4 Geo. II.
c. 28.

By the Statute of Uses (27 Hen. VIII. c. 10), s. 8, a power of distress is attached to rent-charges limited to uses or created under that statute.

By 4 Geo. II. c. 28, the like remedy by distress is given in cases of rent-seck, rents of assize, and chief rents, as in the case of rent reserved upon lease.

44 & 45 Vict.
c. 41.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44, a power to distrain is given to a person entitled to receive out of any land, or out of the income of any land, any annual sum payable half-yearly or otherwise, whether charged on the land or the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion.

46 & 47 Vict.
c. 61.

The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 44, limits the right of distress to one year's

(n) See Stephen's Commentaries (5th ed.), vol. 1, pp. 632 et seq.

arrears, instead of six years', in respect of a holding to which the Act applies.

At common law a reversion is necessary to found the remedy by distress.

An underlease exceeding the original term deprives the underlessor of the remedy by distress for want of a reversion, and this defect is not remedied by the underlessor acquiring a reversionary lease commencing from the determination of the original lease, since a reversionary lease merely creates an *interesse termini* until entry thereunder and does not enlarge the term of the original lease (o).

If the rent be reserved for years, and be severed from the reversion, it may then go to the executor or administrator, although the reversion goes to the heir. Thus if a man, seised of land in fee, makes a lease for years, reserving rent, and afterwards devises the rent to a stranger and dies, and the stranger is seised of the rent and dies, his executors shall have the rent and not his heirs (p).

Though the whole rent which accrues after the death of the lessor should go with the reversion to the heir, yet the arrearages of rent, which became payable in his lifetime, will go to the lessor's personal representative as part of his personal estate (q).

At common law the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for lives of rents, services, rent-charges, rent-secks, and fee farms had no remedy to recover arrearages of such rents, for remedy whereof the stat. 32 Hen. VIII. c. 37, s. 1, enacted that such executors and administrators should have an action of debt for all such arrearages against the tenant in arrear and his executors and administrators, and empowered them to distrain for the arrearages so long as the lands charged with the payment continued in the seisin or possession of the tenant in arrear or of any other person claiming only by and from the same tenant by purchase, gift or descent (r).

Reversion necessary to found remedy by distress.

Underlease exceeding original term deprives underlessor of remedy by distress.

Original term not enlarged by reversionary lease.

Rent severed from reversion may go to personal representative.

Arrearages of rent are part of deceased's personal estate.

Personal representatives of deceased tenants in fee simple, in tail, or for lives of rents have by 32 Hen. VIII. c. 37, double remedy by action of debt and distress to recover arrearages.

(o) *Lewis v. Baker*, [1905] 1 Ch. 46.

(p) *Williams* (10th ed.) 631.

(q) *Ibid.*, 631.

(r) *Ibid.*, 631, 632.

Statute only applies where owner of rent, had he lived, could have distrained;

and so long only as land continues in hands of him from whom rent is due or of any person claiming through him.

The statute applies only to cases in which the owner of the rent, if he had lived, might have distrained; and therefore, if the rent be in arrear, and the owner grants away his interest and dies, his executors or administrators have no remedy for these arrearages (e).

The statute gives the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him from whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent, *ad infinitum*: but they cannot be distrained upon for such rent, if they be in the hands of one claiming paramount to him. Therefore, if the lord enter upon the grantor for an escheat, the land shall not be distrained upon for arrears of rent. So where a man makes a lease for life, rendering rent, remainder for life, remainder in fee, and after the accruing of rent from the first tenant for life, the lord dies and then the tenant for life dies, the executors cannot distrain upon the remainderman; because he claims not by or from the tenant for life. And if tenant in tail grant a rent for life, and die, the executor of the grantee cannot distrain upon the issue in tail, who comes in under the original gift in tail, and not under the grantor of the rent (f). But if a man seised in fee grants a rent-charge to A. for the life of B., and the land is subsequently settled on C. for life, with remainder to D. in fee, if then B. dies, and afterwards C. dies, A. may, by the statute, distrain D. in remainder for all arrears in the life of C. (u).

Rent reserved on lease for years was not within the statute.

If a person seised in fee of land demised it for years, reserving rent, and died, his executor or administrator could not, under this statute, distrain for arrears of rent accrued in his lifetime, since the deceased was not tenant in fee simple, or tenant at all, of the rent or within the meaning of the statute (x).

(e) Williams (10th ed.) 696.

(f) *Ibid.* 697.

(u) Eldrich's Case, (1605) 5 Rep. 118 a.

(x) Prescott v. Boucher, (1832) 3 B.

& Ad. 849; and see Jones v. Jones, (1832) 3 B. & Ad. 967, where Ld. Tenterden, C.J., approves the statement of the law on this subject as contained in Williams on Executors.

But by stat. 3 & 4 Will. IV. c. 42, s. 37, it was enacted, "that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime in like manner as such lessor or landlord might have done in his lifetime." And s. 38 provides, "that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due."

Effect of 3 & 4 Will. IV. c. 42, s. 37, giving representatives of deceased lessor power to distrain.

The Land Transfer Act, 1897, would seem now to supersede this statute where the arrears and the immediate reversion both vest in the personal representative.

Effect of Land Transfer Act, 1897.

Action of debt was at common law incident to rent reserved upon leases for years (y).

Action of debt for rent under leases for years.

(5) *Of Apportionment of Accruing Rent and other Periodical Payments.*

With regard to accruing rents, generally speaking at common law there was no apportionment in favour of the executor or administrator of the deceased tenant for life as against the heir or remainderman. In the case of a rent continuing after the death of the testator, the whole rent passed with the reversion to the remainderman or heir, and in the case of rents reserved on leases determining on the death of the person making them, or on the death of the tenant *pur autre vie*, the rent was lost altogether (z).

At common law no apportionment for accruing rent.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), now provides as follows:—

Apportionment Act, 1870.

Sect. 2. "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under

Rents, etc., to be considered as accruing from day to day and apportionable accordingly.

(y) See *Prescott v. Boucher*, *ubi sup.* at p. 856.

(z) See *Williams* (10th ed.) 632.

an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Apportioned
part, when
recoverable.

Sect. 3. "The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before."

Sect. 4. "All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

Entire rent to
be recovered
by heir or
other person
entitled as if
there had
been no ap-
portionment,
and appor-
tioned part
recoverable
from him.

Sect. 5. "In the construction of this Act—

"The word 'rents' includes rent service, rent charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

"The word 'annuities' includes salaries and pensions.

The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital."

Sect. 6. "Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description."

Sect. 7. "The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

The Act applies to specific devises, and the rent being apportioned as on the day of the testator's death, the apportioned part will fall into the residuary personal estate (a). The income arising from personalty specifically bequeathed is also apportionable as between the specific legatee and the residuary legatee (b).

Act applies to specific devises ;

also to specific bequests.

Where a fund is invested by trustees in stock on which a dividend is accruing, the Apportionment Act does not apply to the dividend when received, but the tenant for life is entitled to the whole dividend (c); nor does the Act apply to a sale of stock "cum dividend," although the purchase-money is thereby augmented (d).

Act does not apply to purchases and sales by trustees of investments cum dividend ;

The Act only applies to sums which are accruing but have not accrued due at the time when the apportionment is said

nor to rent payable in advance.

(a) Hasluck v. Pedley, (1874) L. R. 19 Eq. 271.

(c) *Re Clarke*, (1881) 18 C. D. 160.

(b) Pollock v. Pollock, (1874) L. R. 18 Eq. 329.

(d) *Bulkeley v. Stephens*, [1896] 2 Ch. 241.

to be required, and therefore the Act does not apply to rent payable in advance (*e*).

What is "a trading or other public company" under the Act.

The words "trading or other public companies" in s. 5 of the Act include any public company, but not a private partnership (*f*). Any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act (*g*). So also is a life assurance society, unincorporated but established by a deed of settlement (*h*).

What are "other periodical payments" under the Act.

The words "other periodical payments" in s. 2 of the Act refer to payments which are made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and further, they must be in the nature of income, that is, coming in from some kind of investment, as in other cases with which the Act deals. Consequently the words have no application to profits arising from a private trading partnership (*i*), or from the carrying on by trustees of the testator's own business (*k*).

No application to profits of private trading partnership.

Bonus to shareholders of public company, when apportionable.

The word "dividends" in s. 2 of the Act includes payments by way of bonus or surplus profits to the shareholders of a public company, even though such payments may be only occasional, and not strictly periodical, and are apportionable under the Act (*l*). With regard to whether a bonus so declared should be treated as income apportionable or as capital, the general principle applicable is thus stated in *Bouch v. Sproule* (*m*):—"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of

(*e*) *Ellis v. Rowbotham*, [1900] 1 Q. B. 740.

(*f*) *Jones v. Ogle*, (1872) L. R. 8 Ch. 192; *Re Griffith*, (1879) 12 C. D. 655.

(*g*) *Re Lysaght*, [1898] 1 Ch. 115, 122.

(*h*) *Re Griffith*, *ubi sup.*

(*i*) *Jones v. Ogle*, *ubi sup.*

(*k*) *Re Cox's Trusts*, (1878) 9 C. D. 159.

(*l*) *Re Griffith*, *ubi sup.*

(*m*) (1885) 29 C. D. 635, 653, and see 12 App. Cas. 385, 397.

its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income, shall be income, and what it says is capital, shall be capital." It was further laid down by the House of Lords in the same case that in considering whether a company has distributed its accumulated profits as dividends, or converted them into capital, regard must be paid both to the form and the substance of the transaction (*n*).

Articles of association of a company, though binding the shareholders, merely define and state the legal position as between them and the company, and a shareholder can deal with the dividends on his shares and effect or prevent apportionment notwithstanding the articles. Such articles, therefore, cannot amount to an express stipulation against apportionment within the meaning of s. 7 of the Act (*o*).

With regard to payments such as fines on admittance to copyhold property, and reliefs or heriots payable on death or alienation of a tenant of a manor, if such payments became due before the death of the lord, they pass as fruit fallen as his personal estate, and do not go with the inheritance (*p*).

Act does not apply to fines, reliefs, or heriots.

(6) *Copyright.*

The law relating to copyright in the deceased's interest in literary property, dramatic and musical compositions, and works of art, is regulated by the various Copyright Acts (*q*).

The duration of copyright in books is for a term of forty-two years from the first publication, or for the natural life of

Duration of :
in books ;

(*n*) See also per Stirling, J., in *Re Malam*, [1894] 3 Ch. 578, 585.

(*o*) *Re Oppenheimer*, [1907] 1 Ch. 599.

(*p*) See Williams (10th ed.) 636.

(*q*) See Copinger's Law of Copyright (4th ed.) (1904), and also Scrutton (1903), and Macgillivray (1902), on the same subject.

the author and a further term of seven years from his death, whichever is the longer; and in case of a book published after the death of the author, the copyright endures for the term of forty-two years from the first publication thereof, and is the property of the proprietor of the author's manuscript (*r*).

in dramatic
and musical
compositions;

The sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition is the property of the author thereof and his assigns, and endures for the term provided by the Act for the duration of copyright in books (*s*).

in engravings
and prints.

The duration of copyright in engravings and prints is for a term of twenty-eight years from the first publication (*t*), and in paintings, drawings and photographs for the life of the author and seven years after his death (*u*).

Nature of
property in
unpublished
works.

The property of an author in an unpublished work, independent of the statute (*x*), as well as in statutory copyright (*y*), is personal property, and vests in his personal representative, who has the right to publish (*z*), and also the right to restrain others from publishing without his consent (*a*).

Effect of
death of
author before
agreement
with pub-
lisher is
complete.

Where an author agreed with a bookseller for publication of a work of science at a price according to a certain rate per sheet, payable by instalments as the work was published, and died after publication of one volume, constituting in itself a complete part, it was held that his representatives were entitled to the price of the finished portion according to the stipulated rate (*b*).

Proprietor-
ship in letters.

With regard to proprietorship of copyright in letters, it is clear that at common law the property in the paper with the writing upon it—the actual physical thing, and nothing more—is in the person to whom the letter is sent, but the writer of

(*r*) 5 & 6 Vict. c. 43, s. 3.

(*s*) Sect. 20.

(*t*) 7 Geo. III. c. 38.

(*u*) 25 & 26 Vict. c. 68, s. 1.

(*x*) *Southey v. Sherwood*, (1817) 2 Mer. 435.

(*y*) *Burnett v. Chetwood*, (1720) 2 Mer. 441, n.

(*z*) *Dodsley v. McFarquhar*, Mor.

Dict. of Dec., p. 8308, App. pt. 1.

(*a*) *Burnett v. Chetwood*, *ubi sup.*
Thompson v. Stanhope, (1774) Amb. 737.

(*b*) *Constable & Co. v. Robinson's Trustees*, Mor. Dict. of Dec., vol. 11, App. 12. As to the personal nature of agreements between authors and publishers, see *ante*, p. 264.

the letter, notwithstanding that he has sent it to somebody else, and that that person has a right to the physical thing, retains that peculiar right of property which entitles him and his legal personal representatives to prevent its publication by others. Under the Copyright Act, 1842 (5 & 6 Vict. c. 45), book includes a letter, and by s. 8 the copyright in a book which is first published in the lifetime of its author shall be the property of such author and his assigns for the period mentioned in the section, but the copyright in every book published after the death of its author, for the period in the section mentioned, shall be the property of the proprietor of the author's manuscript, which in the case of a letter is the proprietor of the letter itself, *i.e.*, of the paper and the writing upon it(c).

There is no warrant for extending the proprietary right to prohibit publication, and, so far as there is no rule of law of general application or created by special circumstances to prevent that result, the possession of a letter ought to be treated as conferring all the rights usually incident to property. But a mere authority to write a biography is not an authority to publish letters procured for the purpose, or any extracts therefrom, or paraphrases thereof, or to do more than use the information contained in the letters (d).

(7) *Patent Rights, Trade Marks and Designs.*

An inventor has no property in his invention, but he has such an interest in an invention, for which he intends to take out a patent, as to be able to make and enforce an agreement concerning it (e).

Inventor has no property in his invention.

Except in the case of convention applications under s. 91 of 7 Edw. VII. c. 29, the true and first inventor, or his legal representative, must be a grantee of letters patent for an invention, for, in virtue of the Statute of Monopolies and 7 Edw. VII. c. 29, s. 48, the Crown has otherwise no authority

True and first inventor or his representatives may obtain grant of letters patent.

(c) *Macmillan & Co. v. Dent*, [1906] 577.

1 Ch. 101, aff. [1907] 1 Ch. 107.

(e) *Frost's Patent Law and Practice*

(d) *Philip v. Pennell*, [1907] 2 Ch. (3rd ed.) (1906) vol. 2, pp. 101, 105.

Other persons
may be joined
in grant.

to make the grant. But a patent granted to several persons jointly is not invalid because some or one of them only are or is the true and first inventors or inventor, or legal representative of such. It is thus competent to an executor or administrator to apply for a patent for the invention of the deceased testator or intestate, and to give an interest in it from the beginning to a third party by joining him in the application for the grant (f).

Effect of the
Patents Act,
1907.

By the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 17, the duration of every patent is limited to fourteen years, but under s. 18 the Court may extend the term for a further period not exceeding seven, or, in exceptional cases, fourteen years.

By s. 37, where a patent is granted to two or more persons jointly, unless otherwise specified in the patent, they are to be treated for the purpose of the devolution of the legal interest therein as joint tenants, and, if any such person dies, his beneficial interest in the patent devolves on his personal representative as part of his personal estate.

By s. 48, if a person claiming to be inventor dies without making an application for a patent for the invention, application may be made by, and a patent for the invention granted to, his legal representative, on his making a declaration that he believes the deceased person he represents to be the true and first inventor of the invention.

By s. 71, where a person becomes entitled by assignment, transmission, or other operation of law to a patent, the comptroller shall, on request and on proof of title to his satisfaction, register him as the proprietor; and any equities in respect of the patent may be enforced in like manner as in respect of any other personal property.

A trade mark can only be registered in respect of particular goods or classes of goods (g), and when registered it can only be assigned and transmitted in connection with the goodwill of the business concerned in the goods for which it has been

Effect of
registration
of a trade
mark.

(f) *Ibid.*, vol. 1, p. 4.

(g) Trade Marks Act, 1905 (5 Edw.

VII. c. 15), s. 8.

registered, and is determinable with that goodwill (*h*). It is the registration of a person as proprietor of a trade mark which gives the exclusive right to the use of it (*i*), and except in the case of a trade mark in use before the 18th August, 1875, and which has been refused registration under the Act of 1905, no person is entitled to institute any proceeding to prevent, or to recover damages for infringement of an unregistered trade mark (*k*).

Copyright in a design applicable to any article of manufacture may be obtained by registration under the Patents and Designs Act, 1907, during five years from the date of registration, with power for the comptroller to extend the period for a second period of five years from the expiration of the original period.

Effect of registration of a trade design.

(8) *On Death of Corporation Sole.*

In the case of a corporation sole, as a bishop, parson, vicar, a chose in action on his death will pass to his legal personal representative and not to his successor. But a chose in action may go in succession to a corporation sole by custom, *e.g.*, bonds taken by the Chamberlain of London for the benefit of the orphanage fund; also by charter, *e.g.*, penalties recovered by the President of the College of Physicians (*l*); also by statute, as in the case of the Public Trustee.

Choses in action of a corporation sole pass to his legal personal representative.

Except by custom, charter, or statute.

SECT. 2.—*Of Rights accrued after the Death of the Testator or Intestate.*

Where the cause of action accrued in the lifetime of the deceased the action must be brought by his legal personal representative in his representative capacity (*m*). But where the cause of action accrued after the death of the deceased, his representative has in some cases an option either to sue in his representative capacity or in his individual capacity.

The character in which representative should sue.

Inasmuch as the property of personal chattels draws to it the possession, so that the owner may bring either trespass

For damage to property representative may sue in his own name.

(*h*) Trade Marks Act, 1905 (5 Edw. VII. c. 15), s. 22.

(*i*) *Ibid.*, s. 39.

(*k*) *Ibid.*, s. 42.

(*l*) Williams (10th ed.) 637.

(*m*) *Ibid.*, 1517.

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or trover at his election against any stranger who takes them away, and since the executor or administrator is in point of law the owner of the goods which belonged to his testator or intestate, whether in actual possession of them or not before the tort committed, he may declare, as any other person may, upon his own property when wrongfully damaged by another (n).

Right to sue in representative character depends on whether money when recovered would be assets.

The right of the personal representative to sue in that character must depend on whether the money he sues for would be assets when recovered. The difficulties arise where the executor or administrator is also beneficially interested as legatee or next-of-kin, since, as soon as he has assented to take, the benefit would be no longer assets; and again where the question is in what character a business is being carried on by him (o).

Administrator *de bonis non* should sue in representative character.

Where a contract was entered into with the administrator, as administrator, and he dies, since the proceeds of the action on the contract when recovered would be assets of the original intestate the administrator *de bonis non* is the proper person to sue, and should declare as such, and any other declaration would be incorrect (p).

Where there are several representatives contract by one gives no right of action to all, although money when recovered would be assets.

Although an executor or administrator has the option to sue in his representative character on contracts made with himself, where the money when recovered would be assets of the testator or intestate, yet if there are two or more representatives a contract entered into by one of them alone (unless he contracted on account of himself and the others or generally on account of the estate) cannot be enforced by the others, notwithstanding that the money when recovered would be assets, since that circumstance cannot alter the contract itself (q).

Question as affecting right of set-off and counter-claim.

Whether a personal representative may sue or be sued in that character or not is important as affecting the right to set-off and counter-claim (r).

(n) Williams (10th ed.) 659.

(o) Abbott v. Parfitt, (1871) L. R. 6 Q. B. 346, 350.

(p) Moseley v. Rendell, (1871) L. R. 6 Q. B. 338.

(q) Heath v. Chilton, (1844) 12 M. & W. 632.

(r) Clark v. Hougham, (1823) 2 B. & Cr. 149, 155.

When a personal representative discovers that he has in his representative character committed a devastavit by paying that which he ought not to have paid, he ought to sue in the same character to recover it again, since the money when recovered will continue assets, and if the action were brought in his individual character the demand might be subject to a set-off, or when recovered liable to his debts.

Money wrongfully paid away should be reclaimed in representative capacity.

Ord. 18, r. 5, of the R. S. C. provides that claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

Ord. 18, r. 5.

Ord. 8, r. 4, provides that if a person sues or is sued in a representative capacity the indorsement of the writ shall show in what capacity he sues or is sued.

Ord. 8, r. 4.

In many cases an action on which the deceased himself could not have sued may accrue to the executor or administrator in his own time upon a contract made with the testator or intestate in his lifetime (s). Likewise a right to sue, which never existed in the testator or intestate, may accrue to the executor or administrator by remainder; as where a lease is made to B. for life, the remainder to his executors for years, or where a lease for years is bequeathed by Will to A. for life and afterwards to B. who dies before A., although B. never had the term in him, yet it shall devolve on his executors, who may maintain an action in respect of it (t). So a suit may accrue in the time of the executor or administrator by reason of a condition made to the deceased and not performed until after the death of the testator or intestate (u).

Right of action may accrue after death;

or in remainder;

or on performance of a condition after death.

SECT. 8.—Of Contingent and Executory Interests.

Contingent and executory interests, whether in real or personal estate, are transmissible to the representative of the

Contingent and executory interests are transmissible to representatives;

(s) Williams (10th ed.) 666.

(u) *Ibid.*

(t) *Ibid.*, 668.

unless being
in existence
when con-
tingency
happens is
essential to
description.

party contingently entitled, though dying before the contingency upon which they depend takes effect (*x*). It would seem the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take, as in the case of a gift to the next eldest son of Joseph, who shall survive Henry, for his life, with remainder to his eldest son who shall also survive Henry. Under such words, obviously, surviving Henry would be an essential part of the description of the legatee, and only the eldest son who did so survive would be entitled (*y*).

A mere
expectancy
or possibility
is not trans-
missible ;

but the
benefit of an
agreement
relating
thereto is
transmissible.

A mere expectancy or possibility, a *spes successionis*, such as the expectant or possible interest of a person becoming the heir-at-law or next-of-kin of a person still living, not being by English law a title to property (*z*), is not transmissible to his executor or administrator (*a*). But all future property, possibilities and expectancies are assignable in equity for value (*b*), and the benefit of such an assignment is transmissible to the executors or administrators of the assignee. To make such an assignment effective, notice of it must be given, as soon as the fund comes into existence, to the person having control of the fund (*c*).

(*x*) Williams (10th ed.) 670.

(*y*) See per Kay, J., in *Re Creswell*, (1883) 24 C. D. 102, 107.

(*z*) *Re Parsons*, (1890) 45 C. D. 51.

(*a*) Williams (10th ed.) 672 n. (*y*)

(1888).

(*b*) Tailby v. Official Receiver, 13 App. Cas. 523, 543.

(*c*) *Re Dallas*, [1904] 2 Ch. 385.

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A personal contract, such as an agreement to serve the deceased as clerk for a term of years, is determined by the death of the employer, and the fact that the deceased employer, in and by his will, directs his executors to discharge the employee, which they accordingly do, gives him no right of action. *Grant v. Johnson et al.* (1864), 5 N.S.R. 493.

Death
ends
personal
contract.

An action cannot be maintained against executors, representing the estate, for an infringement of a patent, by their testator, unless, *semble*, it be made to appear that, by reason of the wrongful act complained of, property of a tangible character had passed from the plaintiff to the testator, as distinguished from the testator's merely saving of expense by improper use of the invention. *Leslie v. Calvin* (1885), 9 O.R. 207.

R.S.O. 1897, c. 129, s. 11, providing that a person wronged in respect of his person or property by one, since deceased, may maintain an action against the administrators or executors of the latter, does not authorize such an action against an administrator *ad litem* merely, but only against an executor or general administrator, clothed with full power to collect the assets, pay the debts and divide the estate. *Hunter v. Boyd* (1902), 3 O.L.R. 183.

In the absence of fiduciary relationship no recovery can be had against the representatives of the deceased person who is charged with fraud, unless profit has accrued to the wrongdoer's estate. *Hamilton Provident and Loan Society v. Carnell* (1884), 4 O.R. 623.

Fraud.

By C.S.U.C., c. 78, s. 1, in case of injury to real estate, within six months prior to the owner's decease, the executors, etc., could maintain an action if brought within one year of the decease. By section 2, if a wrong were committed by a man within six months of his death, in respect of real

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or personal property, the person wronged could maintain an action against his executors, etc., within six months after such executors had taken on themselves administration of the estate. These sections appear in R.S.O. 1877, c. 107, as sections 8 and 9. Then the Amending Act, 49 Vict. c. 16, s. 23, substitutes for these two sections the sections 9 and 10 which appear in R.S.O. 1887, c. 110. See now R.S.O. 1897, c. 129. Section 9 allows executors to maintain an action for all torts or injuries to the person or the real or personal estate of the deceased, except in cases of libel or slander. Accordingly, the personal representatives of a deceased plaintiff can, in case of death of the plaintiff *pendente lite*, on entering a suggestion of the death and obtaining an order of revivor, continue the action. *Mason v. Town of Peterborough* (1893), 20 A.R. 683.

Where the plaintiff in an action for criminal conversation dies *pendente lite*, the action may, under section 10 R.S.O. 1897, c. 129, be continued in the name of his personal representative. *C. v. D.* (1905), 10 O.L.R. 641.

Trespass.

In *Miller v. Corkum* (1899), 32 N.S.R. 358, the executor's testator had commenced an action for trespasses to land extending over a period of six years previous to issue of writ. Order 17 of the Nova Scotia Judicature Act provided, *inter alia*, for the procuring of an order permitting a defendant to sign judgment for costs of defence, where, upon death of the plaintiff, the cause of action survived, but the person entitled to proceed failed to proceed, and c. 113, s. 1, R.S.N.S., provided for survival of actions based on trespasses for injury to the real estate committed within six months of the decease for which deceased might have maintained an action. The executor, thinking that the action was dead, failed to proceed. The defendant procured an order permitting him to sign judgment for his costs in the event of the failure of the executor to appear within 20 days after the service of the order, and to obtain leave to proceed with the action. It was held that, as to such of the six years' trespasses as were

committed within six months of the decease, the action survived, and that, therefore, the defendant was entitled to hold the order obtained. Also that the statute authorized the continuance by the executor of the action instituted by his testator. And see to similar effect *Grant v. Wolfe* (1899), 32 N.S.R. 444.

Where a statute provided that a municipality shall pay all expenses of the service of the militia, when called out in aid of the civil power to suppress a riot, and, in case of a refusal, that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses, the commanding officer having died pending such an action, it was held that the proceedings could be continued by his personal representative. *Crewe-Read v. Municipality of Cape Breton* (1887), 14 S.C.R. 8.

Where, after the commencement of an action for injury occasioned by negligence and improper conduct of the defendant in the management of a vessel, defendant died, it was held that the action could not be revived against his executor. *Cameron v. Milloy* (1872), 22 U.C.C.P. 331.

Upon the death before judgment of the sole beneficiary, on whose behalf the administrator has brought an action under the Fatal Accidents Act, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative. *McHugh v. Grand Trunk Ry. Co.* (1901), 2 O.L.R. 600. *Quære*, whether the decision of *Darlington v. Roscoe & Sons* (1907), 1 K.B. 219 affects the authority of this case. The English case is under the English Workmen's Compensation Act.

Fatal
Accidents
Act.

An unsuccessful action for negligence, brought by an administrator under the Nova Scotia equivalent of the Fatal Accidents Act, is not a bar to a subsequent action by the administrator for damages to the deceased's estate (the deceased having lived for some days after the injury, and, in the interval, incurred expense), nor to an action at common

law by the administrator in his personal capacity as father and master *per quod servitium amisit*. *Hawley v. Wright* (1904), 37 N.S.R. 77. And see *Monaghan v. Horn*, 7 S.C.R. 409.

The widow and child of a person killed in consequence of the defendant's negligence may, when letters of administration have not been issued, bring an action under R.S.O., c. 166, without waiting until the lapse of six months after the death. *Curran v. Grand Trunk Ry. Co.* (1898), 25 A.R. 407.

Staying
action.

In *Mummery & Whalls v. Grand Trunk Ry. Co.* (1901), 1 O.L.R. 622, an action was brought, under the Fatal Accidents Act, by the paternal grandfather and grandmother of the deceased, an unmarried man. While such action was pending the mother of the deceased, who had obtained administration after the grandparents had commenced their action, instituted a second action. The defendants applied to stay either of the actions. It was decided that while the grandparents' action had been rightly brought (there being no personal representatives at the time) yet, an administratrix having been appointed and an action brought by her within the statutory period of six months, she, the administratrix, was entitled to proceed with it, and the first action must be stayed.

In an action brought by an administratrix under the Fatal Accidents Act she may join a claim for damages sustained by the personal estate of the deceased because of the accident. *Mummery et al. v. Grand Trunk Ry. Co.* (1901), 1 O.L.R. 622.

Administra-
tor
ad litem.

The only living issue and heir at law of a female intestate, who in her lifetime had brought an action to set aside, on the ground of undue influence, a transfer made by her to the defendant of her property, applied under Ontario Rules 194 and 195, for an order appointing him administrator or administrator *ad litem* of the deceased. It was held that the order could not be made under Rule 194 for the reasons given in *Hughes v. Hughes* (1881), 6 A.R. 373, nor under Rule 195, which is not applicable to the case of a plaintiff

who, without right or title, has commenced an action and then seeks to legalize his illegal act by an order of the Court. *Fairfield v. Ross* (1902), 4 O.L.R. 534.

In an action under the Fatal Accidents Act and the Workmen's Compensation Act, because of the death of the defendant's servant through defendant's negligence, the plaintiff has no right to claim for funeral expenses. *Mikarsky v. Canadian Pacific Ry. Co.* (1907), 15 Man. L.R. 54.

Even though the legislation provide that actions for compensation for fatal injuries must be brought by the executor or administrator, moneys recovered in such an action are not garnishable in an action against the executor or administrator as such. *McEwan v. Spekt* (1906), 4 W.L.R. 325.

Under R.S.N.S. 1900, c. 177, s. 2, dealing with actions against executors for injuries done by the testator, although the action is brought in the lifetime of the testator, if he dies before judgment there can be no recovery against the estate, if six months have elapsed between the acts complained of and the death. *McDonald v. Dickson* (1905), 40 N.S.R. 560.

Only one action will lie under the Fatal Accidents Act, R.S.O. 1897, c. 166. Accordingly, where a woman, claiming to be a widow, brought action, joining her two children as co-plaintiffs, and, subsequently, another woman, also claiming to be a widow, brought another action, joining her child as co-plaintiff, the second action was stayed, and the rights of all parties worked out in the first. *Morton et al. v. Grand Trunk Ry. Co.* (1904), 8 O.L.R. 372.

Staying
second
action.

For the law of the Province of Quebec respecting survival of actions, see *Canadian Pacific Ry. v. Robinson* (1892), A.C. 481, reversing 19 S.C.R. 292.

EXECUTORS.

In Alberta by c. 11, Ordinances, 1903, s. 29, the executors and administrators of a deceased person are empowered to maintain actions for torts, and such action must be brought within one year of the decease.

As to the application, in Alberta, of the Statute of Limitations to actions against executors, see c. 11, s. 55, Ordinances, 1903.

In every action commenced by an executor or administrator, in which the defendant becomes entitled to costs, judgment ought to be entered against such executor or administrator personally. *Granger v. O'Neill* (1899), 31 N.S.R. 462.

The general rule is that an executor, acting in good faith, is entitled to be recouped his costs of an unsuccessful action, but where an executor, without direct authority, or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party, it was held that this general rule would not justify the executor in resorting to specifically devised real estate for the costs. *In re Champagne, St. Jean v. Simard* (1904), 7 O.L.R. 537.

CHAPTER XX.

OF THE RIGHTS OF HUSBAND AND WIFE.

SECT. 1.—*At Common Law.*

(1) *As to leasehold interests of wife.*

THE common law gave the husband a qualified interest in his wife's chattels real in possession during the coverture. The husband was possessed thereof in her right, and was entitled to receive the rents and profits during the coverture, with power during the coverture of disposing of the property otherwise than by his Will. If he disposed thereof by a complete act in his lifetime her right of survivorship was defeated, but if he left them *in statu quo*, and the wife survived him, she was entitled to them, to the exclusion of the husband's legal personal representative (a).

Rights of husband at common law.

If he survived his wife his interest became complete, and he became entitled *jure mariti* to all chattels real of the wife vested in possession during the coverture *jure uxoris* and undisposed of by him and left *in statu quo* during the coverture, and there was no need for him to take out letters of administration to his wife; and the rule was the same as to an equitable term (b).

If husband survived his interest became complete *jure mariti*; and need not take out letters of administration.

A reversionary interest in leaseholds belonging to a wife was assignable by the husband, if it were of such a nature that it might by possibility vest in the wife in possession during the coverture. And even though it could not take effect in possession during the coverture, if the husband survived his wife, in order to entitle him to such an interest it was not necessary that he should take out administration to her (c).

(a) Williams (10th ed.) 523.

(b) *Ibid.*, 528; *Re Bellamy*, (1884) 25 C. D. 620, 623.

(c) *Re Bellamy*, *ubi sup.*, and cases cited in the judgment.

Will of husband cannot dispose of chattels real of wife against her surviving.

Disposition of husband must effect complete alteration in nature of joint interest:

e.g., judgment in action for possession in his own name alone,

award by arbitrator,

acceptance of a new lease.

Husband may make a partial disposition as by underlease reserving rent to himself;

but if both join in lease the rent is incident to the reversion.

Effect of mortgage by husband of his wife's chattels real.

The Will of the husband cannot dispose of the chattels real of the wife against her surviving him; for as that does not take effect till after his death, the law takes precedence, and vests the term in the wife immediately upon his decease (*d*).

To defeat the wife's claim on her surviving her husband, the disposition by the husband in his lifetime of his wife's chattels real must be of a description to effect a complete alteration in the nature of the joint interest (*e*).

If husband and wife be ejected of a term which he enjoyed in her right, and he commences an action of ejectment in his own name, and obtains judgment, the recovery will change the wife's property in the term, and vest it in the husband (*f*).

An award in favour of the husband by an arbitrator in a dispute between him and a third person is sufficient (*g*).

So also the acceptance of a new lease by the husband, for, by operation of law, the old term is thereby surrendered (*g*).

The husband may make a partial disposition of his wife's chattels real; for instance, if the husband alone grants an underlease of a portion of a term belonging to his wife reserving rent, and dies, the reversion expectant on the underlease belongs to the surviving wife; but, the underlease being in derogation of the wife's estate, the rent reserved is not incident to the reversion, but passes to the legal personal representative of the husband (*h*). Had both husband and wife joined in the lease, the rent would have been incident to the reversion and belonged to the wife (*i*).

So with regard to a mortgage by the husband of his wife's chattels real, unless his intention to defeat her right can be collected from the particular instrument of mortgage, the Court regards the instrument that nothing more was intended than that which was necessary to make the estate a security to the mortgagee for the money advanced; and the mere

(*d*) Williams (10th ed.) 524.

(*e*) *Ibid.*

(*f*) *Ibid.*

(*g*) *Ibid.*, 525.

(*h*) *Ibid.*, 526; and see Preston's

Abstracts of Title, vol. I. p. 344, and 1 Roper, Husband and Wife (2nd ed.) 174.

(*i*) Preston's Abstracts of Title, vol. I., p. 345.

circumstance that the proviso for redemption points, in terms, to a mode of conveyance not in conformity with the title, is generally not sufficient to induce the Court to depart from that presumption (*k*). But if in any case the husband, after the estate of the mortgagee has become absolute, pays the money, and takes an assignment to himself, the property will be altered, and the term will go to the executors of the husband to the exclusion of the wife (*l*).

It would seem that, on the principle that that which for a valuable consideration is agreed to be done is considered in equity as actually performed, if the husband had agreed to dispose of his wife's chattels real, as by sale, charge, or underlease, such agreement would be enforced against the surviving wife (*m*), but in the case of the interest of the husband in right of his wife in a term of years being equitable, should it be necessary for the persons claiming in right of her husband to come into equity to enforce performance of the agreement, the person seeking equity must do equity, and the Court will recognise the wife's equity to a settlement (*n*).

Effect of husband's agreement for sale, charge, or underlease of his wife's chattels real.

(2) *As to choses in action of wife.*

Apart from the Married Women's Property Acts, 1870 and 1882, the law is that choses in action which are given to the wife, either before or after marriage, survive to her after the death of her husband, provided he has not reduced them into possession; but as to those choses in action which come during the coverture, the husband may bring an action for them in his own name, and that recovering in his own name is equal to reducing them into possession (*o*).

Rights of husband at common law.

Effect of judgment recovered by husband in his own name.

If a husband be seized of a rent service, rent charge, or rent seek, in right of his wife, and the rent be in arrear during the coverture, and then the husband dies, the wife shall have the arrearage (*p*).

Arrearages of rent.

(*k*) *Clark v. Burgh*, (1845) 2 Coll. 221; *Pigott v. Pigott*, (1867) L. R. 4 Eq. 549.

(*l*) *Williams* (10th ed.) 526.

(*m*) *Macqueen's Husband and Wife*

(4th ed.) 24.

(*n*) *Ibid.*

(*o*) *Williams* (10th ed.) 641.

(*p*) *Ibid.*, 643.

If the wife survive her husband rent in arrear reserved to them jointly on an underlease of the wife's property will at the death of the husband survive to the wife by virtue of the joint interest. But if she were not a party to the derivative lease, or if she were a party, and the rent was reserved to the husband alone, then, as well the arrears as the future rent will belong to the legal personal representatives of the husband (q).

Assignments
by husband
void as
against wife's
right of
survivorship.

An assignment even for valuable consideration by the husband of a chose in action of his wife, as well present as reversionary, is void as against the wife's right by survivorship unless the fund is reduced into possession in the meantime (r). If the assignee during the life of the husband reduces the fund into possession the wife's right by survivorship will be barred (s).

What
amounts
to reduc-
tion into
possession.

A mere intention by the husband to reduce the wife's choses in action into possession will be insufficient to defeat her right by survivorship. The acts to effect that purpose must be such as to change the property in them, or, in other words, must be something to divest the wife's right and to make that of her husband absolute, such as a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him or to be applied to his use (t).

Receipt
by agent
approved
by husband
and wife.

It was also held, prior to the Married Women's Property Act, 1882, that the receipt by an agent, approved by husband and wife, of money forming part of the estate of an intestate of which the wife was administratrix, the debts of the intestate having been paid and the shares of the next-of-kin being immediately receivable, amounted to a reduction into possession by the husband of the wife's distributive share of the money (u).

(q) Williams (10th ed.) 643.

(r) Prole v. Soady, (1868) L. R. 3 Ch. 220; and see cases referred to in Williams (10th ed.) 645, n. (y), also Watson's Comp. of Equity (2nd ed.), p. 346.

(s) Allday v. Fletcher, (1857) 1 De G. & J. 82.

(t) Williams (10th ed.) 646.

(u) Re Barber, (1879) 11 C. D. 442.

The husband's receipt or possession of his wife's choses in action must, however, be in the character of husband in order to defeat his wife's title by survivorship (*x*). Thus where a trustee and executor (who alone proved) married one of the residuary legatees named in the Will, his possession of the testator's personal estate was considered as that of trustee and executor only, and not as husband, and therefore his wife's share of the residue could not be deemed sufficiently reduced into possession so as to prevent its surviving to her upon his death (*y*). So a transfer of stock to the husband merely as a trustee cannot be considered as a reduction into possession so as to entitle his representatives (*z*).

Receipt by husband must be in that character; his receipt as executor or trustee merely is insufficient.

The husband may entitle himself to all his intended wife's personal estate, whether in possession or in action, or which she may afterwards acquire, by becoming a purchaser of it by agreement previously to and in contemplation of the marriage (*a*).

Husband may acquire title by contract previously to marriage.

If the husband survive his wife, on taking out letters of administration to her he will be entitled, as such administrator, to all her personal estate which continued in action or unrecovered at her death (*b*).

If husband survive he will be entitled on taking administration to his wife.

If the husband should die before he has obtained a grant of the administration, or, after having taken out letters, before all her property in action has been reduced into possession, such property cannot be recovered by his representatives, but administration must be taken out to the wife for that purpose, either generally or *de bonis non*, as the case may require. Such administrator, however, will be considered in equity as a trustee of what he receives for the personal representatives of the husband (*c*).

(3) *As to chattels personal in possession.*

At law the marriage is an absolute gift to the husband of all chattels personal in possession of the wife in her own right,

Rights of husband at common law.

(*x*) Williams (10th ed.) 651.

Ves. 413.

(*y*) Baker v. Hall, (1806) 12 Ves. 497.

(*a*) Williams (10th ed.) 653.

(*b*) *Ibid.*, 654.

(*z*) Wall v. Tomlinson, (1810) 16

(*c*) *Ibid.*, 655.

In equity.

whether the husband survive the wife or not (*d*); and there is no distinction in this respect between property to which the wife is entitled in equity and property to which she is entitled at law, except that in the former case, it being subject to the control of the Court of Equity, the wife may assert her equity for a settlement, but this equity does not depend upon any right of property in her. It arises upon the husband's legal right to present possession; the principle has no application to a remainder or reversion until it falls into possession (*e*).

Extent of equity to a settlement.

The wife's equity to a settlement extends to all unsettled property to which she is entitled, and the amount to be settled is discretionary, depending on the particular circumstances of each case, and under special circumstances she may be entitled to have the whole fund settled (*f*). Although in making a provision for the wife the Court always includes the children of the marriage, yet, the right being personal to herself, it cannot be enforced by her children if before decree she should waive her right or die (*g*).

(4) *As to pin-money.*

Nature of pin-money.

Those gifts of money by the husband to the wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin-money, will be good in equity as against the husband and all volunteer claimants through him (*h*).

Savings out of housekeeping.

So where on the death of the husband there is no deficiency of assets to pay debts the wife will not be liable to account for sums saved out of housekeeping (*i*), and will be allowed to retain savings arising out of trivial matters connected with the farm, as where she has been allowed to dispose and make a profit out of butter, eggs, poultry, pigs, fruits, etc. (*k*).

(*d*) Co. Lit. 351 b.

(*e*) *Osborn v. Morgan*, (1851) 9 Hare, 489; and see *Knight v. Knight*, (1874) L. R. 18 Eq. 487, 490.

(*f*) *Spirett v. Willows*, (1860) L. R. 1 Ch. 520; *Re Suggitt's Trusts*, (1867) L. R. 3 Ch. 215; *Roberts v. Cooper*, [1891] 2 Ch. 335.

(*g*) For further information on this subject see Williams (10th ed.) 1155 *et seq.*

(*h*) Williams (10th ed.) 582.

(*i*) *Mangey v. Hungerford*, (1734) 2 Eq. Cas. Abr. 156 in marg.

(*k*) *Slanning v. Style*, (1734) 3 P. Wms. 334, 337.

But savings by the wife out of her pin-money, or other allowance made by the husband, are not exempted from the husband's debts in the event of deficiency of assets (*l*). Savings not exempted from husband's debts

It would seem that the wife cannot claim against the husband's representatives more than one year's arrears of pin-money, and if pin-money be in arrear, and the wife dies, her representatives cannot sustain any claim to it whatever (*m*). But the principle on which this rule was established is that while the estate is enjoyed by the husband, and the wife is maintained by him, it will be presumed that she has consented to forego her claim against her husband or his estate. So that where pin-money is secured on the husband's property, and either the wife has parted with her right to the personal enjoyment of the pin-money, or the husband has been deprived of the enjoyment of the estate on which the pin-money is charged, the principle does not apply, as, for instance, in a case where the wife had assigned her pin-money for valuable consideration, and the estate chargeable was not enjoyed by the husband, but was under a receiver appointed by the Court, it was held that the assignee was entitled to recover the entire amount of the arrears (*n*). Arrears of pin-money.

(5) *As to paraphernalia.*

Paraphernalia are apparel and ornaments given by the husband to the wife suitable to his rank and degree (*o*). Nature of paraphernalia.

The gift of jewels and ornaments as paraphernalia is implied by the husband allowing his wife to wear them (*p*), and that they should be in the custody of the husband at his death will make no difference (*q*).

Old family jewels, which have been handed down from father to son, cannot be claimed as paraphernalia notwithstanding they may have been worn by the wife at Court and elsewhere (*r*). Family jewels.

(*l*) Williams (10th ed.) 583.

(*o*) Williams (10th ed.) 584.

(*m*) Howard v. Digby, (1834) 2 Cl. & F. 634; and see Williams (10th ed.) 583, 584.

(*p*) *Ibid.*, 586.

(*q*) Northey v. Northey, (1740) 2 Atk. 77, 79.

(*n*) Tuffnell v. O'Donoghue, [1897] 1 I. R. 360.

(*r*) Jervoise v. Jervoise, (1853) 17 Beav. 586.

Power of
disposition

There is a distinction between gifts of the husband to the wife for her separate use and gifts by him to her as paraphernalia, for she may dispose absolutely of the things given to her for her separate use, but where the husband expressly gives anything to her to be worn as ornaments of her person only they are to be considered merely as paraphernalia and she cannot dispose of them by gift or Will during his life, and the husband may dispose of them in his lifetime (s), although he cannot dispose of them by Will during her life (t).

Liability
for hus-
band's debts.

If there are not assets of the husband at his death available for payment of his debts *bona paraphernalia* are liable to his creditors, and it makes no difference that contingent assets afterwards fall in (u).

It would seem that the widow is entitled to the extent of her paraphernalia to have her husband's assets real and personal marshalled in her favour similarly to a simple contract creditor (x).

If in pledge
by husband
at his death
wife entitled
to have them
redeemed.

Although the husband may alien the wife's paraphernalia in his lifetime, yet if the alienation is not absolute, but as a pledge or security for money, the wife surviving him will be entitled to have them redeemed by his executors out of his personal estate, if sufficient for that purpose after payment of his debts (y).

Right to
parapher-
nalia may be
barred by
agreement
or election.

The widow may bar her right to paraphernalia by agreement with her husband, or by electing to take them with other benefits by way of legacy under his Will restricted to her life interest (z).

General law
not affected
by Married
Women's
Property
Act, 1882.

The Married Women's Property Act, 1882, has not abolished the general law as to gifts of paraphernalia (a).

Effect of
marriage as
to severance
of joint
tenancy.

(6) *As to property of which wife is joint tenant.*

The effect of marriage on particular property in which a woman has an interest as joint tenant depends on whether the

(s) *Graham v. Londonderry*, (1746) 3 Atk. 393; and see *Williams* (10th ed.) 586.

(t) *Northey v. Northey*, *ubi sup.*

(u) *Williams* (10th ed.) 587.

(x) *Ibid.*, 588; and see *post*, p. 500.

(y) *Williams* (10th ed.) 589; and see *Graham v. Londonderry*, *ubi sup.*

(z) *Ibid.*

(a) *Tasker v. Tasker*, [1895] P. 1.

marriage divests the property from the wife and vests it in the husband. If the effect is to vest the property in the husband then there will be a severance of the joint tenancy, but if it does not vest the property in the husband then there is no severance. Where some *novus actus interveniens* on the part of the husband is required, *e.g.*, an assignment of the wife's chattels real or reduction into possession of her choses in action, in neither of these cases does marriage operate as a severance (*b*). It follows that in cases where there has been no severance the wife's interest does not survive to the husband.

SECT. 2.—*Equitable Doctrine of Separate Use.*

By the introduction of the equitable doctrine of separate use a married woman was considered as capable of possessing property to her own use, independently of her husband; such property is called her separate estate, and in respect of it, if unaccompanied by any restraint on anticipation, she is considered as a *feme sole*, enjoying and capable of exercising her rights as such.

Nature of equitable doctrine of separate use.

Such property may be acquired either by contract with the husband before the marriage or by gift from him, or from any stranger, wholly independent of such contract. So far as his legal rights as husband may interfere, the Court will treat him as a trustee (*c*).

How separate property may be acquired.

So also a woman might prior to marriage, in cases clear of fraud on the marital rights, assign her property to trustees for her separate use, which would have effect on her marriage (*d*).

Although at law gifts from the husband to the wife were void, yet in equity a husband might become a trustee for his wife; and if by clear and irrevocable acts he makes himself such trustee the gift will be conclusive (*e*). But if the husband makes an imperfect gift to the wife the Court will not in the

Gifts by husband to wife.

(*b*) *Re Butler's Trusts*, (1888) 38 C. D. 286.

B. C. C. 345.

(*c*) *Per* *Ld. Langdale in Tullett v. Armstrong*, (1839) 1 Beav. 1, 21.

(*e*) *Mews v. Mews*, (1852) 15 Beav. 529, 533; and see *Williams* (10th ed.) 579.

(*d*) *Strathmore v. Bowes*, (1788) 2

case of a husband and wife any more than in any other case hold that the intending donor is a trustee for the wife (*f*). Such a gift, however, may be perfected by the wife becoming executor of her husband (*ff*).

Purchase by husband in joint names of himself and his wife.

Where a husband purchases personal property in the name of his wife, or in their joint names, it will be presumed to have been intended as an advancement and provision for the wife, and on surviving her husband she will be entitled (*g*). But such presumption may be rebutted, and the surrounding circumstances may be taken into consideration so as to say it is a trust for the purchaser and not a gift (*h*).

Right of husband *jure mariti* should he survive.

On the death of the wife the quality of separate property ceases, and should the husband survive his wife, any such property undisposed of by the wife, either during her life or by Will, and in her actual possession at her death, belongs to the husband *jure mariti*, and he need not become her administrator to entitle himself to it (*i*). But it has been held in a case relating to leasehold property to which a married woman was entitled in possession for her separate use—and there can be no distinction in respect of other personal property in possession settled for her separate use—that although there is no necessity for the husband surviving to take out letters of administration, but the property passes to him *jure mariti*, yet that by reason of s. 28 of the Married Women's Property Act, 1882, he is subject to the same liabilities as she would be if living (*k*).

SECT. 3.—*The Married Women's Property Acts, 1870, 1882.*

Woman married after August 9, 1870.

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 7, a woman married after the 9th August 1870, becoming entitled during her marriage to any personal property as next-of-kin of an intestate or to any sum not exceeding £200 under any deed or Will, such property, subject and without

(*f*) *Re Breton*, (1881) 17 C. D. 416; and see Williams (10th ed.) 581, n. (*p*).

(*ff*) *Re Stewart*, (1908) W. N. 147.

(*g*) Williams (10th ed.) 580; and see *Re Young*, (1885) 28 C. D. 705.

(*h*) *Marshall v. Crutwell*, (1875) L.R.

20 Eq. 328.

(*i*) *Molony v. Kennedy*, (1839) 10 Sim. 254; and see Williams (10th ed.) 573, n. (*m*).

(*k*) *Sarman v. Wharton*, [1891] 1 Q. B. 491.

prejudice to the trusts of any settlement affecting the same belonged to her for her separate use. This Act is repealed by s. 22 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), saving any act done or right acquired while in force, and by the later Act (s. 2) every woman married after the 1st January, 1883, shall be entitled to hold as her separate property, and to dispose of as a *feme sole*, all real and personal property belonging to her at the time of marriage or acquired by or devolving upon her after marriage, and (s. 5) every woman married before the 1st January, 1883, shall be entitled to hold, and to dispose of as aforesaid, as her separate property, all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after that date^(l). Sect. 19 provides that the Act shall not interfere with or affect any settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or render inoperative any restriction against anticipation. But by the Married Women's Property Act, 1907^(m), any such settlement shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age; but if she died an infant any covenant or disposition by her husband contained in the settlement shall bind or pass any interest in any property of hers to which he may become entitled on her death, and which he could have bound or disposed of if the Act had not been passed.

Woman married after January 1, 1883.

Woman married before January 1, 1883.

Saving as to settlements.

If the husband survives the wife that to which at her death she is entitled under the Act of 1882 as separate property belongs to the husband, but not having taken any legal interest therein during her life he must obtain a grant of administration⁽ⁿ⁾.

Husband surviving must obtain grant of administration to wife's separate property under Act of 1882.

Savings and investments by a married woman of the income of separate property, are also separate property^(o).

Investments of savings also separate property.

(l) This refers to the date when the title was acquired, and not when the property falls into possession, *Reid v. Reid*, (1886) 31 C. D. 402.

(m) 7 Edw. VII. c. 18, s. 2.

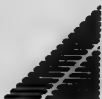
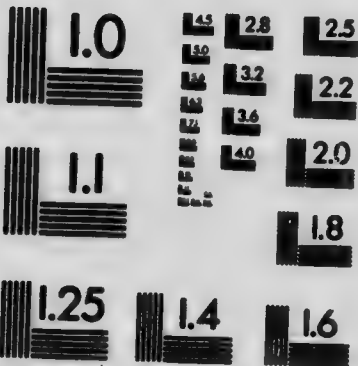
(n) Williams (10th ed.) 521, n. (y), and 573, n. (m), *ante*, p. 97.

(o) Williams (10th ed.) 47, 578; and see *Finlay v. Darling*, [1897] 1 Ch. 719; *Re Clutterbuck's Settlement*, [1905] 1 Ch. 200.



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CANADIAN NOTES.

The Common Law and rules of Equity, regarding marital rights and separate use, as expressed in the text, have been expounded in many Canadian cases; but, in such a work as this and in view of the well-settled character of such law and rules, of the enactment of the various Married Women's Property Acts, and the dissimilarity, in some respects, of the legislation, it is considered unnecessary and inadvisable to note such cases or set forth such Acts, here.

The separate estate of a married woman is liable for her funeral expenses. *Re Gibbons* (1899), 31 O.R. 252.

Where the defendant had delivered to the wife of the plaintiff a promissory note in payment of a legacy bequeathed to her, and she died before payment, it was held that a plea that the wife as payee of the note had died before the plaintiff had reduced the legacy or the note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action on the note. *Robinson v. Cripps* (1857), 6 U.C.C.P. 381.

On the death of the husband before judgment in an alimony action, the solicitor was held entitled to recover his costs against the executors of the husband's estate, as for necessities. *Kerr v. Rickard* (1888), 8 C.L.T. Occ. N. 335.

A husband who, before marriage, and in order to it, has renounced his marital rights, cannot be replaced by the Court in the benefit out of which he has contracted himself, and further, he is not in such case entitled to administration of his wife's estate, for administration follows interest. *Dorsey v. Dorsey* (1899), 30 O.R. 183.

Where a husband's conduct toward his wife was such that she was unable, safely or comfortably to remain in his house, she has the right to pledge his credit for the suitable maintenance of herself and her children, and where the wife's

father had for several years supported his daughter and grandchildren, but made no claim against the husband during his lifetime, and after his death made a claim against the husband's estate, he was held entitled to recover. The executor, under the peculiar circumstances, was justified in resisting payment, and so was allowed his costs of litigation on the administration of the estate. *Griffith v. Patterson* (1873), 20 Gr. 515.

CHAPTER XXI.

OF "DONATIO MORTIS CAUSA."

**Essentials to
a *donatio
mortis causâ.***

THERE are three essentials to constitute a *donatio mortis causâ*. (1) The gift must be with a view to the donor's death. (2) It must be conditioned to take effect only on the death of the donor by his existing disorder. (3) There must be a delivery of the subject of the donation(a).

**(1) Contem-
plation of
death.**

(1) A *donatio mortis causâ* can only be established by an expressed intention or by a necessary implication that the gift should not take effect except in the event of the death of the donor(b).

Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death(c).

A gift made in contemplation of suicide is not a valid *donatio mortis causâ*(d).

**(2) Condition
that gift shall
be returned if
death does not
follow.**

(2) The condition that if the donor live the thing shall be returned to him need not be expressly declared; it will be inferred if the gift is made in expectation of death(e).

If the donor survive the illness during which the transfer or delivery was made, the gift cannot operate as a *donatio mortis causâ*, and the donee will be considered as a trustee for the donor(f).

**Intention to
make an
immediate
and irrevoc-
able gift will
negative
*donatio mortis
causâ.***

If it appear from the circumstances of the transaction that the donor intended to make an immediate and irrevocable gift that would destroy the title of the party who claims the

(a) Williams (10th ed.) 591; and see *Cain v. Moon*, [1896] 2 Q. B. 283, 286.

(b) *Tate v. Leithead*, (1854) Kay, 658, 662.

(c) Williams (10th ed.) 591; 1 *Rop. Leg.* (4th ed.) 4.

(d) *Agnew v. Belfast Banking Co.*, [1836] 2 Ir. R. 204.

(e) *Gardiner v. Parker*, (1818) 3 Madd. 184.

(f) *Staniland v. Willott*, (1850) 3 M. & G. 664.

property as a *donatio mortis causâ*; and the Court will not aid a volunteer to carry into effect an imperfect gift: by treating it as a *donatio mortis causâ* (g).

(3) To substantiate the gift there must be an actual tradition or delivery of the thing to the donee himself, or to some one else for the donee's use by the donor himself or by his order (h). (3) Actual delivery.

An antecedent delivery to the donee, though made *alio intuitu*, is, however, sufficient (i). What is sufficient delivery.

The deceased must not only part with the possession, but also with the dominion over whatever is the subject of the gift. So that where the deceased delivered over a box containing money, telling the donee it was entirely at her disposal after he was gone, but that he should want it every three months while he lived, and retained control of the key, it was held there was no *donatio mortis causâ* (k).

The gift, however, may be coupled with a trust or charged with the performance of some particular purpose, for instance the payment of the expenses of the deceased's funeral (l).

Where the nature of the thing will not admit of corporeal delivery it would seem delivery of the means of coming at the possession or making use of the thing given will be sufficient, for instance the delivery of the key of a trunk or of a warehouse in which goods are deposited (m).

A negotiable instrument which requires nothing more than delivery to pass to the donee the money secured by it may be the subject of a *donatio mortis causâ* (n); so also an unendorsed negotiable instrument payable to the donor or order may be the subject of a *donatio mortis causâ* (o); and a cheque payable to the donor or order stands on the same footing as a promissory note or bill of exchange (p). What may be the subject of *donatio mortis causâ*: negotiable instruments passing by delivery; unendorsed negotiable instruments payable to order; endorsed cheques payable to donor or order;

(g) *Edwards v. Jones*, (1836) 1 My. & C. 226.

(h) *Williams* (10th ed.) 593.

(i) *Cain v. Moon*, *ubi sup.*

(k) *Reddell v. Dobree*, (1839) 10 Sim. 244; *Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812.

(l) *Hills v. Hills*, (1841) 8 M. & W

401; and see *Solicitor to the Treasury v. Lewis*, *ubi sup.*

(m) *Williams* (10th ed.) 594; *Mustapha v. Wedlake*, [1891] W. N. 201.

(n) *Williams* (10th ed.) 595.

(o) *Re Mead*, (1880) 15 C. D. 651.

(p) *Clement v. Cheeseman*, (1884) 27 C. D. 631.

mortgage
deeds;

bond;
policy of
assurance;
deposit note;
savings bank
book.

No valid
*donatio mortis
causâ* where
delivery of
subject passes
no property
legal or equi-
table.

Promissory
note or cheque
of donor.

In these cases the property is not transferred at law, but the delivery of the instrument entitles the donee to the assistance of a Court of Equity to make the gift complete in accordance with the principles laid down in the decision of Lord Eldon in *Duffield v. Elwes* (q), where he held that a mortgage can be the subject of a *donatio mortis causâ* by delivery of the mortgage deeds, since the property in the deeds, and the right to recover the money secured by them, passed by the delivery, followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee to make the gift effectual, and where necessary the personal representatives must lend their names to enable the donee to recover the money, he having an equitable title to it (r).

The same principle applies to delivery of a bond (s), a policy of insurance (t), a banker's deposit note (u), a Post Office Savings Bank deposit book (x).

Where no property legal or equitable is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis causâ* (y), for instance delivery of receipts for South Sea annuities (z), certificates of railway stock (a), the certificate of stock placed on the Savings Bank Investment Account and credited to the depositor (b), or certificates of building society shares (c).

A promissory note or a cheque being for the unconditional payment of money, has not that reference to the death of the donor which is essential to constitute a valid *donatio mortis causâ*, and therefore cannot operate as such in favour of the payee (d).

(q) (1827) 1 Bligh, N. S. 497.

(r) See Williams (10th ed.) 596, and *Re Dillon*, (1890) 44 C. D. 76, 82.

(s) *Gardiner v. Parker*, *ubi sup.*

(t) *Witt v. Amies*, (1864) 33 Beav. 619.

(u) *Re Dillon*, *ubi sup.*

(x) *Re Weston*, [1902] 1 Ch. 680;
Re Andrews, [1902] 2 Ch. 394.

(y) Williams (10th ed.) 598.

(z) *Ward v. Turner*, (1752) 2 Ves.

Sen. 431.

(a) *Moore v. Moore*, (1874) L. R. 18 Eq. 474.

(b) *Re Andrews*, *ubi sup.*

(c) *Re Weston*, *ubi sup.*

(d) *Tate v. Hilbert*, (1793) 2 Ves. 101; *Hewitt v. Kaye*, (1868) L. R. 6 Eq. 198; *Re Beaks' Estate*, (1872) L. R. 13 Eq. 489; *Re Mead*, (1880) 15 C. D. 651; *Re Beaumont*, [1902] 1 Ch. 889.

Where the cheque is in the lifetime of the donor negotiated or paid away by the donee for valuable consideration (e), or where the money is received immediately after the death of the testator before the banker is apprised of it(f), the gift has been validated, but rather as a mere donation than as a *donatio mortis causâ(g)*.

A *donatio mortis causâ* differs from a legacy in these respects:

Difference between *donatio mortis causâ* and a legacy.

(1) Probate of it is unnecessary, for such a gift takes effect from delivery, so the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act.

(2) For the same reason no assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee(h).

A *donatio mortis causâ* differs from a gift *inter vivos* in these respects, in which it resembles a legacy(i):

Resemblance between *donatio mortis causâ* and a legacy.

(1) It is ambulatory, incomplete, and revocable during the testator's life. The revocation may either be effected by the recovery of the donor from his disorder, or by resumption of the possession of the subject. But he cannot revoke the donation by a subsequent Will, for, on the death of the donor, the title of the donee becomes by relation complete and absolute from the time of delivery. It may, however, be satisfied by a legacy given to the donee.

(2) It is liable to the duties imposed on legacies by the express provisions of the statute 8 & 9 Vict. c. 76, s. 4, and to estate duty by s. 2 of the Finance Act, 1894.

(3) It is liable to the debts of the testator upon deficiency of assets(k).

A *donatio mortis causâ* will be established solely on the evidence of the donee, if such evidence is considered trustworthy(l).

Evidence to establish *donatio mortis causâ*.

(e) Rolls v. Pearce, (1877) 5 C. D. 730.

(f) Tate v. Hilbert, *ubi sup.*

(g) Williams (10th ed.) 599, n. (y).

(h) *Ibid.*, 599.

(i) *Ibid.*, 600.

(k) Tate v. Leithead, (1854) Kay, 658, 659.

(l) *Re Farman*, (1888) 57 L. J. Ch. 637; *Re Dillon*, (1890) 44 C. D. 76, 80; *Re Weston*, [1902] 1 Ch. 680, 684.

CANADIAN NOTES.

A pass book is a proper subject of a *donatio mortis causa*. *Thorne v. Perry* (1900), 2 N.B. Eq. 146; *Perry v. Thorne*, 35 N.B.R. 398; *Re Reid*, 6 O.L.R. 420; *Adams v. Union Bank of Halifax* (1906), 1 E.L.R. 317, 561; *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319. But the handing over of two mortgages and some title deeds to a person with a statement that they were for her and a promise to execute an assignment of them does not constitute a *donatio mortis causa* of the mortgages. *Ward v. Bradley* (1901), 1 O.L.R. 118.

Constructive
delivery.

Three things must concur in order to establish *donatio mortis causa*; the gift must have been made in contemplation, though not necessarily in expectation of death; there must have been delivery of the subject matter of the gift to the donee or some one for him, and, it must have been made under such circumstances as shew that the thing is to revert to the donor in case of recovery. *Thorne v. Perry* (1900), 2 N.B.Eq. 146; *Perry v. Thorne*, 35 N.B.R. 398.

Constructive delivery is sufficient and is the equivalent of actual delivery. *Hall v. Hall* (1891), 20 O.R. 684.

Solicitor
and
client.

Where, at the time of the making of an alleged *donatio mortis causa* the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to anyone, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the testator such gift could not be supported. *Davis v. Walker* (1903), 5 O.L.R. 173.

The gift to the donee may be symbolical but must be made with the intention of taking effect before the death of the donor. *McKinnon v. McKinnon* (1896), 28 N.E.R. 189.

The delivery to a third person for the use of the donee is sufficient, provided that such third person is not a mere trustee, agent or servant of the donor. *Walker v. Foster* (1900), 30 S.C.R. 299.

Where one key delivered was that of a trunk in the room and another key delivered was of a cash box in the trunk, (in which cash box money and notes were), it was held that this was a good *donatio mortis causa*. *Charleton v. Brooks* (1903), 6 O.L.R. 87. The delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property and transfers the possession of and dominion over the same. The consent of the donor or even his knowledge of the delivery is not requisite. *Walker v. Foster* (1900), 30 S.C.R. 299. Delivery of key.

Where shortly before his death the plaintiff's uncle delivered to her his watch and pocket book and the key of his cash box, which was then in possession of his solicitor, and the keys of two rooms in which were contained securities for moneys and chattels, accompanying the delivery with words of gift, having reference to the articles actually delivered, it was held that as regards the contents of the box, and the property in the rooms the alleged gift had not been made out, and no *donatio mortis causa* had been established except in respect to the watch and pocket book. *Hall v. Hall* (1891), 20 O.R. 684, 19 A.R. 292. See *Young v. Derenzy* (1879), 26 Gr. 509; *Freeman v. Freeman* (1889), 19 O.R. 141.

Where a person being ill and not expecting to recover requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000, which Deposit receipt.

he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother and a sister, and the brother then drew out three cheques or orders for \$2,000 each, payable out of the deposit receipt to the respective beneficiaries, which the sick person signed and returned to his brother, who handed to the wife of the sick person the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt, it was held a valid *donatio mortis causa* of the deposit receipt and the sum it referred to, notwithstanding that there was a small amount for interest not specified in the gift. *McDonald v. McDonald* (1902), 33 S.C.R. 145. See also, as to gift of deposit receipt. *Hill v. Hill* (1905), 8 O.L.R. 710.

A bank is justified in refusing to pay over money deposited with it to a person in possession of the bank book and claiming the money under a *donatio mortis causa*, unless such representative of the deceased is joined in the action so that the judgment might bind the estate of the deceased. *Adams v. Union Bank of Halifax* (1906), 1 E.L.R. 317, 561.

Evidence.

The claimant to make out a title must shew by clear and unmistakeable proof the intention to give and that the gift was consummated by delivery. *Freeman v. Freeman* (1889), 19 O.R. 141; *Thorne v. Perry* (1900), 2 N.B. Eq. 146; *Eastern Trust Co. v. Jackson* (1905), 3 N.B. Eq. 180.

There is no rule of law requiring corroboration, *Eastern Trust Co. v. Jackson* (1905), 3 N.B. Eq. 180, and where, as in Nova Scotia, (R.S.N.S., c. 163, s. 35), and Ontario, (R.S.O. 1897, c. 73, s. 10), a statute providing that an interested party in an action against an estate cannot succeed on the

evidence of himself or his wife or both unless it is corroborated by other material evidence, such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. *McDonald v. McDonald* (1903), 33 S.C.R. 145. See also *Davis v. Walker* (1903) 5 O.L.R. 173.

CHAPTER XXII.

OF THE FUNERAL, COLLECTING THE EFFECTS, AND TESTAMENTARY EXPENSES.

SECT. 1.—*Of the funeral.*

Disposal of
corpse.

THERE is no property in a dead body, and a person cannot dispose of his body by Will, but after his death his executors have a right to the custody and possession of the body until it is properly buried(a).

Obligation of
parent to pro-
vide burial.

It was stated by Lord Campbell, C.J., in *Reg. v. Vann*(b), that there is no doubt that if a parent has the means of providing Christian burial for his child he is bound to do so; but it was held that if he has not the means, though the body remains unburied and becomes a nuisance to the neighbourhood, he is not indictable for the nuisance, notwithstanding he could have obtained money for the burial expenses by way of loan from the poor law authorities of the parish, for he is not bound to incur a debt. It would seem that in such cases, whether the deceased was residing with the parent or emancipated from his parent's roof, the duty of burial properly devolves upon the parish officers under 7 & 8 Vict. c. 10, s. 31(c). And in *Clark v. the London General Omnibus Co., Ltd.*,(d), Farwell, L.J., intimated that he was not at all satisfied that the father is under an actual legal liability, as distinguished from a moral duty, to go to the expense of the burial of his child, even in the case of a child twelve years of age living with her parents.

Obligation of
parish officers.

Obligation of
husband.

There would seem, however, to be a legal liability upon a husband to bury his wife; and a volunteer, employing and

(a) *Williams v. Williams*, (1882) 20 C. D. 659.

(b) (1851) 21 L. J. M. C. 39.

(c) See observations in *Dalton v.*

S. E. Railway Co., (1858) 4 C. B. N. S. 296.

(d) [1906] 2 K. B. 648, 663.

paying an undertaker to conduct the funeral, is entitled to recover the expense so incurred from the husband (e).

When the body is buried in consecrated ground it remains under the protection of the Ecclesiastical Court of the diocese, and cannot be removed from the grave or vault, or mausoleum in which it has been placed, except under a faculty granted by an Ecclesiastical Court, and then only to another grave or vault in consecrated ground, and the Court would not be justified in granting a faculty for enabling remains to be removed after burial for cremation (f).

Removal of
body once
buried.

When burial in consecrated ground and cremation are both desired, cremation should precede and not follow burial. The burial service does not contemplate cremation. But where a body has been consumed in a fire, it has been customary to collect the ashes and to bury them in a churchyard, accompanied with the use of the Order for the Burial of the Dead, and there does not appear to be any legal objection to the same course being followed where there has been a previous cremation in pursuance of directions left by the deceased (g). The body of every person dying in this country, with certain exceptions, is entitled to Christian burial, and where a body has been buried in unconsecrated ground the Home Secretary will, under s. 25 of 20 & 21 Vict. c. 81 grant licence, on a proper application, for the removal of the body from the grave in which it is interred for the purpose of burying it in approved consecrated ground, but no licence would be given to remove the body for the purpose of cremation (h).

Cremation.

To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanor so to dispose of the body as to prevent the coroner from holding the inquest (i).

When crema-
tion may be a
misdemeanor.

The holding of inquests is regulated by the Coroners Act Inquests.

(e) *Ambrose v. Kerrison*, (1851) 20 L. J. C. P. 135.

(f) *Re Dixon*, [1892] P. 386.

(g) *Ibid.*

(h) *Williams v. Williams*, *ubi sup.*

(i) *Reg. v. Price*, (1884) 12 Q. B. D. 247.

1887 (50 & 51 Vict. c. 71), and the expenses are paid by the local authority.

In absence of directions body should be buried not cremated.

If the deceased has left directions as to the disposal of his body, it is the duty of his personal representative to give effect to his wishes. But if the deceased has left no testamentary or clear directions as to his body, it is entitled to Christian burial, and the executor would not be warranted, to gratify his own fancy, without the deceased's sanction, in cremating the body of his testator, and so depriving it of being buried in the state and condition contemplated by this rule of law (*k*).

Anatomy Act, 1832, permits anatomical examination subject to certain restrictions.

By s. 7 of 2 & 3 Will. IV. c. 75 (Anatomy Act, 1832), an executor or other party having lawful possession of the body of a deceased person, and not being an undertaker, may permit the body to undergo anatomical examination, unless the deceased shall have expressed a contrary desire, or unless the surviving husband, or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.

Sect. 8 makes provision for carrying into effect any direction by the deceased for anatomical examination, unless the deceased's surviving husband, or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.

Funeral expenses.

Funeral expenses according to the degree and quality of the deceased are to be allowed of the goods of the deceased before any debt or duty whatsoever (*l*). And under s. 7 of the Finance Act, 1894, in determining the value of an estate for the purpose of estate duty, allowance is to be made for reasonable funeral expenses.

Liability of personal representative.

With respect to the liability of an executor or administrator to the expenses of the funeral of the deceased, it appears to be clear that if an executor or administrator gives orders for the

(*k*) Williams (10th ed.) 736.

(*l*) 3 Inst. 202; and see Williams

(10th ed.) 737

funeral, or ratifies or adopts the acts of another party who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses. And notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained, yet it would seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given, for the funeral of the deceased he will be thereby bound, after he has become administrator, to satisfy the charges incurred under such orders (*m*).

It seems now established, that, in the absence of evidence to charge any other individual, an executor with assets is answerable, in point of law, without any express contract, for the funeral expenses of his testator, suitable to his degree (*n*).

If a person, other than the executor, gives the order for the funeral and pays for it, he may have an action against the executor for so much of the cost as an executor might reasonably pay (*o*), unless perhaps it could be shown that he intended the payment as an act of bounty (*p*).

Right of stranger giving order and paying for funeral.

The law casts upon a husband the duty of burying his wife, but he is entitled to retain the sums expended on her funeral out of her estate as against her creditors (*q*).

Right of husband against deceased wife's assets.

The rule appears to be, that the executor is entitled to be allowed reasonable expenses, according to the testator's condition in life. The amount must necessarily vary according to the circumstances of each case (*r*). As against creditors no more will be allowed for the funeral than is necessary, regard being had to the position in life of the deceased (*s*). But where the estate is solvent the inquiry would seem to be whether the sum expended exceeds what is usual at the

Reasonable expenses allowed.

(*m*) Williams (10th ed.) 1426.

Jur. (N. S.) 496.

(*n*) *Ibid.*, 1427; and see Sharp v. Lush, (1879) 10 C. D. 468, 472.

(*q*) *Re M'Myn*, (1886) 33 C. D. 575.

(*o*) Green v. Salmon, (1838) 8 A. & E. 348.

(*r*) See Williams (10th ed.) 737.

(*p*) Coleby v. Coleby, (1866) 12

(*s*) Hancock v. Podmore, (1830) 1 B. & Ad. 260.

funerals of persons of the same rank and fortune as the deceased (*t*).

Mourning for widow and family not allowed.

Mourning furnished to the widow and family of the deceased is not a funeral expense such as can be claimed against the estate (*u*).

Cost of tombstone.

The cost of a tombstone will not be allowed as against creditors, or as against beneficiaries without their consent in the absence of any testamentary direction (*x*). If a testator has directed or bequeathed a sum certain, or a sum capable of being ascertained, to be applied in the erection of a tombstone or monument to his memory, either in a church, on or consecrated or unconsecrated ground, if the executors insist upon the trust being executed it would seem the Court is bound to see it carried out, although there may be no one able to compel the executors to carry it out (*y*). The same would seem to apply to a direction to expend a sum of money in repairing a tombstone or vault (*z*).

SECT. 2.—Of Collecting the Effects.

As soon as possible after the death, the executor, or the person entitled to and intending to apply for grant of letters of administration, should ascertain the particulars of the estate of the deceased with a view to the preparation of the Inland Revenue affidavit, which must be delivered before grant of probate or letters of administration (*a*), and collecting, getting in and preserving the effects.

As to inventories.

The repealed (*b*) statutes of 21 Hen. VIII. c. 5, and 22 & 23 Car. II. c. 10, provided for the making of inventories by executors and administrators of the goods and chattels of the deceased. But the bond given under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81, is conditioned to make

(*t*) *Mullick v. Mullick*, (1829) 1 Knapp, 245.

(*u*) *Johnson v. Baker*, (1825) 2 C. & P. 207.

(*x*) *Bridge v. Brown*, (1843) 2 Y. & Coll. C. C. 181, 185, 192.

(*y*) *Trimmer v. Danby*, (1856) 25 L. J. Ch. 424, 427; *Re Dean*, (1889) 41 C. D. 552, 557.

(*z*) *Lloyd v. Lloyd*, (1852) 2 Sim. (N. S.) 255, 264; *Re Dean*, *ubi sup.*: and see *post*, p. 407.

(*a*) See *ante*, p. 163.

(*b*) Repealed by 20 & 21 Vict. c. 77, s. 80; and see *ante*, p. 132, as to the administration bond required relating to collecting, getting in and administering the personal estate.

the inventory when called on, and to exhibit the same whenever required by law so to do (c).

According to the modern practice, neither the executor nor administrator exhibits any inventory whatsoever unless required so to do by summons at the instance of a party interested. Having regard, however, to the form of affidavit for Inland Revenue, an application for an order to exhibit an inventory is now very seldom made, but since the affidavit is filed in the Inland Revenue Office and not in the Probate Division, and is not accessible to everybody, it may in some cases still be convenient to apply to the registrar of the Probate Division for an inventory to be exhibited (d).

Modern practice.

In certain cases on the grant of letters of administration a declaration of the personal estate and effects of the deceased is required to be filed in the registry (e).

Declarations of personal estate.

Should any contest arise in the Probate Division as to the validity of the Will or as to the person entitled to the grant of letters of administration the Court will appoint an administrator *pendente lite* for the purpose of taking possession of the deceased's property, and to bring actions, or make demands, and pay debts; and without any contest the Court may grant administration *ad colligenda bona* to a stranger where the necessity of the case requires it (f).

Appointment of administrator *pendente lite* or *ad colligenda bona*.

So also before grant of probate or letters of administration, where no suit is pending in the Probate Division, and after grant, in proceedings for administration, the Chancery Division will, in a proper case, appoint a receiver of the assets (g).

Appointment of receiver.

The liability of an executor or administrator for neglect in collecting and getting in the assets is considered later (h).

SECT. 8.—Of Administration Expenses.

The expenses in administering the estate are a first charge, whether administered in or out of Court (i).

Administration expenses are a first charge on the assets.

(c) See Tr. & Co. P. P. (14th ed.), p. 912, Form 282.

(f) *Ante*, pp. 124, 127.

(d) See Williams (10th ed.) 741 *et seq.*; Tr. & Co. P. P. (14th ed.) 209.

(g) *Ante*, p. 126.

(h) *Post*, p. 571.

(e) See P. R. 1862, r. 42, *ante*, p. 135.

(i) *Loomes v. Stotherd*, (1823) 1 Sim. & Stu. 458, 461.

What are
administra-
tion expenses.

Executorship expenses, testamentary expenses, and administration expenses are synonymous expressions, and mean expenses incident to the proper performance of the duty of the executor or administrator. The word "testamentary" has ceased to have its purely etymological meaning. It applies equally to the case where there is no testament, and the estate is being administered according to the law of the land (*k*). It is immaterial whether a testator does or does not direct his testamentary expenses to be paid out of his general personal estate, as such a direction merely expresses what the law implies (*l*).

Funeral
expenses.

Administration expenses include :—

(1) The funeral expenses (*m*), and these are to be allowed before any debt or duty whatsoever (*n*).

Probate or
estate duty.

(2) Formerly probate duty and now the estate duty on personalty, being a payment which must be made before probate or administration can be obtained (*o*) ; but not estate duty payable in respect of real estate, because it is not required to be paid in order to obtain probate or letters of administration (*p*). A general direction to pay legacies out of a mixed fund of residue charges them rateably on the portions attributable to realty and personalty, and so far as the legacies are payable out of the portion attributable to realty they must be treated as a disposition of real estate and must bear their own estate duty. Estate duty payable in respect of real estate is not a testamentary expense ; and the fact that " testamentary expenses " are directed to be paid out of a mixed fund does not convert into a testamentary expense something which would not otherwise be one (*q*).

Estate duty
on personalty
over which
deceased had
a general
power of
appointment.

(3) Estate duty on personalty over which the deceased had a general power of appointment (*r*) ; but as between appointees

(*k*) *Sharp v. Lush*, (1879) 10 C. D. 468, as explained by Kekewich, J., in *Re Clemow*, [1900] 2 Ch. 182, 190.

(*l*) *Re Spencer Cooper*, [1908] 1 Ch. 130 ; *Re Orlebar*, [1908] 1 Ch. 136, 141.

(*m*) *Sharp v. Lush*, *ubi sup.*

(*n*) *Ante*, p. 306.

(*o*) *Re Clemow*, *ubi sup.*

(*p*) *Re Sharman*, [1901] 2 Ch. 280.

(*q*) *Re Spencer Cooper*, *ubi sup.*

(*r*) *Re Fearnside*, [1903] 1 Ch. 250 ; *Re Creed*, (1905) W. N. 94.

and residuary legatees, unless the estate duty is by direction in the Will thrown on the residue, there is a conflict of decision whether it should be borne by the appointed fund or the residuary estate, the question depending upon whether the appointed fund is property which "passes to the executor as such" within the meaning of the Finance Act, 1894, since if it does not pass to the executor as such the duty is under s. 9 (1) of the Act made a first charge on the property in respect of which duty is leviable, that is, the appointed fund (s).

Where the appointed fund is, at the death of the testator, still a reversionary interest expectant on a prior life interest the corpus of the fund is under s. 2 (1) (b) property which passes on the testator's death, and estate duty is payable on that corpus under s. 3 (4), and the person to whom the property passes for a beneficial interest in possession, or the trustee of the settlement in whom the fund is vested, and not the executor, is the person accountable, and consequently it is not a testamentary expense and it must be borne by the settled fund (t).

Where the appointed fund is at the death of the testator a reversionary interest.

Settlement estate duty is not payable in order to obtain probate, s. 19 (2) of the Finance Act, 1896 (59 & 60 Vict. c. 28) allowing in every case six months after the death within which it may be paid, and it has no analogy to probate duty. Consequently a direction to pay "testamentary expenses" does not extend to settlement estate duty any more than it would to legacy duty on legacies not otherwise expressed to be given free of legacy duty (u).

Settlement estate duty.

But a direction to pay "free from duty" will include the settlement estate duty, and there would seem to be no distinction between a direction to pay "free from duty" or "without

Legacy duty.

Direction to pay "duties" covers all duties.

(s) *Re Treasure*, [1900] 2 Ch. 648 (Kekewich, J.); *Re Maddock*, [1901] W. N. 118 (Kekewich, J.); *Re Power*, [1901] 2 Ch. 659 (Byrne, J.), holding that the appointed fund does not pass to the executor as such; *Re Moore*, [1901] 1 Ch. 691 (Buckley, J.); *Re Dixon*, [1902] 1 Ch. 248 (Buckley, J.);

Re Fearnside, [1903] 1 Ch. 250 (Eady, J.); *Re Creed*, (1905) W. N. 94 (Eady, J.); *Re Orlebar*, [1908] 1 Ch. 136 (Neville, J.), holding that the appointed fund passes to the executor as such.

(t) *Re Dixon*, *ubi sup.*

(u) *Re King*, [1904] 1 Ch. 363.

any deduction" (x); and a direction to pay "debts, funeral and testamentary expenses and duties" is sufficient to throw the burden of the settlement estate duty, as well as the estate duty payable in respect of specifically devised realty, upon the general residuary estate in exoneration of the specifically devised realty (y).

(4) All expenses properly incurred in, about or incidental to obtaining probate or letters of administration (z).

(5) The costs of collecting and warehousing and protecting the assets (including specific legacies), payment and discharge of debts, and in obtaining the advice of solicitors or counsel as to the distribution of the estate (a).

(6) All expenses of realisation of foreign or colonial assets, including the payment of duties to the foreign or colonial government, whether such duties are similar to English probate duty or to legacy duty, are deductions to be made as expenses of the estate to be paid out of the estate generally (b).

(7) Where the trusts of a gross sum when invested are declared by the Will, the costs of the investment, of severing, appropriating and securing the fund, must come out of the general estate (c). But under a direction to accumulate certain securities until the same should amount to a certain sum and then to convert and invest in the purchase of land, the costs of the investment in land are to be paid out of the particular sum directed to be invested (d).

(8) The costs of both plaintiff and defendants of an action properly brought by an executor or administrator for the administration of the personal estate are as a general rule testamentary expenses and will be allowed, and the same rule applies if one of the persons beneficially entitled comes to the

Costs of obtaining probate or letters of administration.

Cost of protecting assets.

Cost of obtaining advice.

Cost of realisation, including foreign or colonial duties.

Cost of severing and appropriating a trust fund.

Costs of action for administration.

(x) *Re Turnbull*, [1905] 1 Ch. 726.

(y) *Re Pimm*, [1904] 2 Ch. 345.

(z) *Re Clemow*, [1900] 2 Ch. 182, 184, 192.

(a) *Sharp v. Lush*, (1879) 10 C. D. 468.

(b) *Petar v. Stirling*, (1878) 10 C. D.

279; *Re Maurice*, (1897) 75 L. T. 415.

(c) *Handley v. Davies*, (1859) 5 Jur. (N. S.) 190, following *Whopham v. Wingfield*, (1799) 4 Ves. 630.

(d) *Gwyther v. Allen*, (1842) 1 Hare, 505.

Court as plaintiff and asks for directions for the proper administration of the estate (e).

In an action for the administration of an estate, where the estate proves to be insufficient to pay all the costs, the legal personal representatives are entitled in priority to other parties to be paid their costs, and the costs of the plaintiff, not being the legal personal representative, are the next charge on the estate (f); and an order in the action that the costs of all parties are to be paid out of a fund does not affect this rule as to priority and amount to a direction that the costs are to be paid equally (g).

Where assets are insufficient to pay all the costs.

In a legatee's action for administration, where the estate is insufficient to pay costs it would seem that the costs are payable in the following order: first, the costs of the legal personal representative as between solicitor and client; secondly, the costs and expenses of the plaintiff in selling and getting in the estate, and the costs of the heir in executing deeds; and, thirdly, the other costs of all parties as between party and party *pari passu* (h). A plaintiff who institutes a suit for the benefit of others obtains a charge on the fund, but not necessarily in preference to the defendants (i).

In legatee's action order in which costs are payable.

In a next-of-kin suit, or in a legatee's suit for administration, where the estate is insufficient for payment of debts, the plaintiff is not entitled to solicitor and client costs, since the Court considers he had no occasion to come to the Court at all (k).

In next-of-kin or legatee's action, if estate insolvent, only party and party costs allowed.

Where the estate is insufficient for payment of debts it belongs to the creditors exclusively, and therefore, if a creditor has, for the benefit of all the creditors, instituted a suit in which he has recovered a fund, he is to be recouped what he

In creditor's action, if estate insolvent, solicitor and client costs allowed;

(e) *Harloe v. Harloe*, (1875) L. R. 20 Eq. 471; *Sharp v. Lush*, *ubi sup.*; *Re Prince*, [1898] 2 Ch. 225; *Re Buckton*, [1907] 2 Ch. 406, 414; *post*, pp. 314, 539.

(f) *Tipping v. Power*, (1842) 1 Hare, 405; and see *Re Turner*, [1907] 2 Ch. 126.

(g) *Re Griffith*, [1904] 1 Ch. 807,

following *Gaunt v. Taylor*, (1843) 2 Hare, 413.

(h) *Wetenhall v. Dennis*, (1863) 33 Beav. 285.

(i) Per Jessel, M.R., *In re Middleton*, (1882) 19 C. D. 552, 556.

(k) *Re Richardson*, (1880) 14 C. D. 611.

has properly expended in recovering it before it is divisible among the creditors *pro rata*, and is entitled to his costs as between solicitor and client and not as between party and party only. This rule applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a next-of-kin or legatee (*l*).

So also, on the same principle, where the testator was one of a firm of traders, and in a creditor's administration action the general estate on realization turned out sufficient to pay in full the separate creditors including the plaintiff's debt, but insufficient to pay in full the joint creditors, the plaintiff was held to be entitled to costs out of the estate as between solicitor and client (*m*).

In a creditor's administration suit, if the estate proves more than sufficient to pay all the creditors in full, party and party costs only are allowed to the plaintiff creditor (*n*).

Prior to the Judicature Act, 1873, a residuary legatee or personal representative filing a bill for administration had a right to have his costs out of the estate, unless that right was displaced by showing some special grounds for depriving him of them, and this right is saved by Ord. 65 of R. S. C. 1875 (*o*). But this rule of the Court of Chancery did not apply to a hostile action seeking to charge the defendant with costs on the ground of acts of misconduct. Such an action is not an ordinary action (*p*).

Ord. 65, r. 1, of R. S. C., 1883, provides: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who was not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate

In creditor's action if estate solvent party and party costs only allowed.

Right of personal representative or residuary legatee to costs in the absence of special grounds.

Discretion of Court as to costs.

(*l*) *Re Richardson*, (1880) 14 C. D. 611.

(*m*) *Re McRea*, (1886) 32 C. D. 613.

(*n*) *Brodie v. Bolton*, (1834) 3 My. & K. 168.

(*o*) *Farrow v. Austin*, (1881) 18 C. D. 58.

(*p*) *Williams v. Jones*, (1886) 34 C. D. 120.

or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge, by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

Ord. 65, r. 14 A, of R. S. C., 898, provides that: "The costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate, unless the Judge shall otherwise direct."

Costs of an unsuccessful claim or resistance to any claim.

Where real and personal estate are being administered in one action, the costs exclusively occasioned by the administration of the real estate, that is, the costs of the action so far only as they have been increased by the administration of the real estate, must be borne by the real estate, the general costs of suit being borne by the personal estate (*q*). This practice has not been altered or affected by the Land Transfer Act, 1897 (*r*). It applies notwithstanding a general direction contained in the Will that the testamentary expenses are to be paid out of the personal estate (*s*).

Costs so far as increased by administration of real estate.

The costs of an action properly incurred in the Probate Division to establish a Will, or unsuccessful proceedings in the Probate Division to have a grant of administration when the Court pronounced against the alleged Will, will be allowed as testamentary expenses (*t*).

When costs in Probate Division are testamentary expenses.

Prior to the Land Transfer Act, 1897, the Probate Division had no jurisdiction to charge the real estate with the costs of an unsuccessful action impeaching the validity of the Will (*u*). But now, by virtue of the Land Transfer Act, 1897, the Probate Division has jurisdiction to deal with real estate of a person dying since the commencement of the Act as well as the personal estate, and under s. 2 (3) the real estate of the deceased is to be administered in the same manner, subject to the same liabilities for debts, costs and expenses, and with the

Jurisdiction of Probate Division to charge real estate with costs as well as personal estate.

(*q*) Patching v. Barnett, (1881) 51 L. J. Ch. 74; *Re* Middleton, (1881) 19 C. D. 552.

(*r*) *Re* Jones, [1902] 1 Ch. 92.

(*s*) *Re* Betts, [1907] 2 Ch. 149.

(*t*) *Re* Clemow, [1900] 2 Ch. 182.

(*u*) *Re* Prince, [1898] 2 Ch. 225.

Effect of
order of Pro-
bate Division
for payment
of costs out
of the estate.

same incidents as if it were personal estate. Consequently the Probate Court can say how the costs of the Probate action shall be borne. But if the Probate Court makes no distinction between the various portions of the estate, but merely directs the costs to be paid out of the estate, the costs are payable out of the entirety, and the proper distribution must be made in due course of administration, and where the personal estate is insufficient, the real estate must bear them (x).

A charge created by an order of the Probate Division which is not administering the estate can only operate upon what remains after payment of the costs of administration in the Chancery Division, and is therefore ineffectual, even in express terms, to give priority over the costs of administration of the legal personal representative (y).

Effect of
direction for
payment of
testamentary
expenses on
distribution.

Although a direction in a Will to pay testamentary expenses would include the costs of an administration action whenever commenced, yet if such an action is not probable the Court will give directions for a distribution of the fund without making provision for any such eventuality (z).

Lapsed share
not primarily
liable for
costs of ad-
ministration.

There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator, consequently the costs of an administration suit come out of the general personal estate and not primarily out of a lapsed share (a).

Costs of ascer-
taining per-
sons entitled
to lapsed
share.

The costs of ascertaining who are the next-of-kin entitled to a lapsed share must be paid out of the general fund before the residue can be arrived at. Executors, therefore, were held not justified where the residue was divisible between six persons, some of whom predeceased the testator, in paying to the surviving legatees their share, and paying the remainder of the residue into Court under the Trustee Relief Act, without setting apart a fund to answer and pay for the costs of ascertaining the next-of-kin (b).

(x) *Re Vickerstaff*, [1906] 1 Ch. 762.

(y) *Re Mayhew*, (1877) 5 C. D. 596.

(z) *Re Cope's Trusts*, (1877) 36 L. T. 437.

(a) *Fenton v. Wills*, (1877) 7 C. D. 33.

(b) *Re Giles*, (1886) 34 W. R. 712.

So also it is the duty of executors to ascertain who the legatees are; that is part of the ordinary course of administration, the costs of which are payable out of residue. The executors cannot, by payment into Court, or any other severance of a legacy, release the residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled to take(c).

Costs of ascertaining persons entitled to legacies.

By Ord. 65, r. 14 b (R. S. C., Nov., 1893), the cost of inquiries to ascertain the persons entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct. And rule 14 c provides that where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred, or is likely to occur, in ascertaining the persons entitled to the other shares, the Court or judge may order or allow immediate payment of their shares to the persons ascertained without reserving any part of those shares to answer the subsequent costs of ascertaining the persons entitled to the other shares; and in all such cases such order may be made for ascertaining and payment of the costs incurred down to and including such payment as the Court or judge shall think reasonable.

Distinction where inquiry is directed by the Court.

CANADIAN NOTES.

Where a testator provided for the erection of "a suitable tablet" over his grave, "not to exceed \$1,500," and also of monumental tablets or stones, etc., and the erection thereof over the graves of his deceased wives, and died worth \$200,000, and the executors spent \$3,000 on a monument to him and his wives, removing the remains of the deceased wives to the same burial place as the testator, it was held that they might properly be allowed the said sum of \$3,000 in their accounts. *Archer v. Severn* (1886), 13 O.R. 316.

The goods of a deceased husband, exempt from seizure under the Execution Act, are not, except as to funeral and

(c) *Re Gibbons' Will*, (1887) 36 C. D. 486.

EXECUTORS.

testamentary expenses, assets in the hands of the husband's executors for the payment of debts. *In re Tatham* (1901), 2 O.L.R. 343.

In an action under the Fatal Accidents Act and the Workmen's Compensation Act, because of the death of the defendant's servant through defendant's negligence, the plaintiff has no right to claim for funeral expenses. *Makarsky v. Canadian Pacific Ry. Co.* (1904), 15 Man. R. 53.

Costs.

An administrator is entitled to be indemnified by the estate for costs paid. *Re Estate of McRae* (1894), 26 N.S.R. 214.

A charge for maintenance includes medical and nursing attendances, funeral expenses, and solicitor's charges respecting these charges. *Howe v. Carlaw* (1888), 15 O.R. 697.

An executor, without direct authority or obtaining indemnity brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party. Held, that though the general rule is that an executor, acting in good faith, is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor in this case resorting for this purpose to specifically devised real estate. *In re Champagne, St. Jean v. Simard* (1904), 7 O.L.R. 537.

An executor or trustee will sometimes be entitled to his costs in a suit for administration, notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach. *Wiard v. Gable* (1860), 8 Gr. 458.

Executors are entitled to their costs where the action is not occasioned by their misconduct; but they were disallowed the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate. *In re Honsberger* (1885), 10 O.R. 521.

Where the misconduct of the administratrix caused the litigation the Court refused to compel any of the other next

of kin to bear the burden of the costs. *O'Sullivan v. Harty* (1885), 11 S.C.R. 322.

Executors cannot be held to have acted reasonably when they fail to follow the plain statutory directions as to notice to creditors and claimants. *Stewart v. Snyder* (1900), 27 A.R. 423.

Where the report of the Master showed that the conduct of the executors, in neglecting to prepare accounts or afford information reasonably called for by the legatees, had given rise to the suit, the Court charged the executors with the general costs of the suit, but set off against such general costs certain costs occasioned by unfounded claims set up by the bill. *Smith v. Roe* (1865), 11 Gr. 311.

A legatee gave to a creditor an order on the executors for payment of her share of the estate, which order was accepted by them as certain payments made on account. The executors denied having funds in their hands sufficient for the payment of the order and properly applicable thereto; but on taking the accounts in this Court it appeared that since 1860 the executors had sufficient funds for that purpose. On a petition filed by the creditor, the Court, under these circumstances, ordered the amount in Court to be paid out to him, and directed the executors to pay the costs of the application and to make good to the legatee the interest accrued since 1860, until the executors paid the moneys into Court. *Sovereign v. Freeman* (1878), 25 Gr. 525.

See also as to costs against executors, *Re Woodhall* (1883), 2 O.R. 456; *Hill v. Hill*, 6 O.R. 244; *In re Williams*, 22 A.R. 196. Executors will be deprived of costs where there has been improper management of the estate. *Kennedy v. Pringle*, 27 Gr. 305; *Simpson v. Horne*, 28 Gr. 1; *Killins v. Killins*, 29 Gr. 472. See also *In re Honsberger*, 10 O.R. 521; *Ianson v. Clyde*, 31 O.R. 579. Costs of an executor are not privileged. *Smith v. Williamson*, 13 P.R. 126. As to costs where the litigation was occasioned by the wrongful though honest act of the executors, see *Willison v. Gourlay* (1907), 10 O.W.R. 853.

CHAPTER XXIII.

OF PAYMENT OF DEBTS.

IMMEDIATELY after grant of probate or letters of administration proper advertisements for claims should be inserted in newspapers, pursuant to s. 29 of 22 & 23 Vict. c. 35(a).

Obligation to observe rules as to priority.

In payment of debts the executor or administrator must observe the rules of law as to priority; for if with notice he pays those of a lower degree first, he must, on a deficiency of assets, answer those of a higher degree out of his own estate(b). So also he is bound to plead a debt of a higher nature in bar of an action brought against him for a debt of an inferior nature and *riens ultra*, if he had not assets for both, otherwise it will be an admission of assets to satisfy both debts(c).

Order of priority.

The order of priority is that which, according to the nature of the debts or of the assets, is prescribed by the laws of the jurisdiction from which the grant issued, and every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether, owing to creditors domiciled or resident in that jurisdiction, or out of it, in that order(d).

But the ancillary administrator, after paying all such creditors as come in and prove their claims, should transmit the surplus to the principal administrator(e).

The following observations apply to the administration of English assets.

(a) *Post*, p. 349.

(b) Williams (10th ed.) 753.

(c) *Ibid.*; and see 1 Saund. 333a, n. (8); also *post*, p. 323.

(d) Westlake's *Priv. Int. Law* (3rd ed.), s. 110.

(e) *Cook v. Gregson*, (1854) 2 Drew. 286, 288.

SECT. 1.—Of Crown Debts.

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the Crown by record or specialty, claim the precedence (*f*).

Debts due to the Crown by record or specialty have precedence.

Debts due to the Crown by matter of record or by specialty are of the same nature; for by stat. 33 Hen. VIII., c. 39, it is enacted, that all obligations and specialties, taken to the use of the King, shall be of the same nature as a statute staple (*g*).

Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails (*h*). Except so far as the legislature has thought fit to interfere, the rule is one of universal application (*i*). In general, the Crown is not bound by a statute unless expressly mentioned, or referred to by necessary implication (*k*).

Between debts of equal degree Crown's right prevails.

Sums of money owing to the King in wood sales, or sales of tin, or other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. So though fines and amercements in the King's Court of Record are clearly debts of record and entitled to such preference, yet amercements in the King's Courts Baron, or Courts of his Honours, which are not of record, have no such priority; nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties; for these are not debts of record (*l*). So also arrears of rent due to the Crown, whether it be a fee farm rent, or a rent reserved on a lease for years, are to be regarded as a debt by simple contract (*m*).

Crown debts by simple contract not preferred to judgment debt of subject.

In *Re Bentinck* (*n*), a testator died insolvent after 1870, owing specialty and simple contract debts, including a simple

Mode of apportioning assets in giving effect to Crown's preference.

(*f*) 2 Inst. 32.

(*g*) See Williams (10th ed.) 756.

(*h*) *Re Henley & Co.*, (1878) 9 C. D. 469, 481.

(*i*) *New South Wales Taxation Commissioners v. Palmer*, [1907] A. C. 179, 182.

(*k*) *Re Henley & Co.*, *ubi sup.* at

p. 482, per Cotton, L.J.; Att.-Gen. for New South Wales v. Curator of Intestates' Estates, [1907] A. C. 519, 522.

(*l*) Williams (10th ed.) 756.

(*m*) *Ibid.*

(*n*) [1897] 1 Ch. 673.

contract debt to the Crown. The assets were more than sufficient for payment of the Crown debt after satisfying the specialty debts. It was held that having regard to *Hind Palmer's Act* (32 & 33 Vict. c. 46) (o), the assets ought first to be apportioned rateably between the specialty and simple contract debts, and that the Crown debt ought then to be taken out of the amount apportioned to the simple contract debts.

Credit for probate duty considered a Crown debt.

By stat. 55 Geo. III. c. 184, s. 45, the commissioners of stamps are authorised, in certain cases upon giving security to give credit for the duties on probates and administrations; and by sect. 48 it is provided that the duty for which credit shall be so given shall be a debt to the Crown, and shall be paid in preference to and before any other debt whatsoever.

Surety to Crown on payment of debt entitled to Crown's priority.

A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate (p).

SECT. 2.—Of Certain Preferential Debts.

Certain debts are given priority by statute over all other claims (q).

Sums due from deceased overseer of the poor.

By 17 Geo. II. c. 38, s. 3, the assets of a deceased overseer of the poor are primarily liable for all sums remaining due which he received by virtue of his office.

Sums due from officer of a registered Friendly Society.

By 59 & 60 Vict. c. 25, s. 35, upon the death of any officer of a registered Friendly Society, having in his possession by virtue of his office any money or property belonging to the society, his legal personal representative shall, upon demand in writing of the trustees, pay the money or deliver over the property to the trustees in preference to any other debt or claim against the deceased's estate. This statute gives priority to the trustees although the debtor's assets consisted of furniture, stock-in-trade, and other property, which cannot be

(o) See *post*, 327.

(p) *Re Lord Churchill*, (1888) 39 C. D. 174.

(q) The Crown is not bound by a statute, unless expressly mentioned or

referred to by necessary implication: *Re Henley & Co.*, (1878) 9 C. D. 469; *ante*, p. 319, but see *Williams* (10th ed.) 759 as to the probable precedence of these debts to those due to the Crown.

considered as specifically belonging to the society (*r*), or of sums not specifically traceable (*s*).

By 56 Vict. c. 5 (the Regimental Debts Act, 1893), s. 2, certain payments are made preferential charges on the property of a person dying while subject to military law. Regimental debts.

By 57 Geo. III. c. 29, s. 51 (Metropolis Act, local), sums collected by a deceased treasurer or collector to paying commissioners are payable in preference to other debts except Crown debts (*t*). Sums due from collector to metropolis paving commissioners.

Where the estate of a person dying insolvent is being administered in bankruptcy under s. 125 of the Bankruptcy Act, 1888 (*u*) or under an order in the Chancery Division (*r*), the provisions of the Preferential Payments in Bankruptcy Act, 1888 (*x*) apply, whereby the following claims are to be paid in priority to all other debts. Preferential payments where insolvent estate is being administered by the Court.

(*a*) All parochial or other local rates having become due and payable within twelve months next before the date of death, and all assessed taxes, land tax, property or income tax up to the 5th day of April next before the death and not exceeding in the whole one year's assessment. (*a*) Rates and taxes.

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the deceased during four months before the date of his death, not exceeding £50. (*b*) Wages or salary of clerk or servant not exceeding £50.

(*c*) All wages of any labourer or workman not exceeding £25, whether payable for time or for piecework in respect of services rendered to the deceased during two months before the date of death. Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority for the whole of such sum, or a part thereof, as the Court may decide to be due under the contract proportionate to the time of service up to the date of the death. (*c*) Wages of labourer or workman not exceeding £25.

(*r*) *Re Atkins*, (1882) 51 L. J. Ch. 406.

(*s*) *Re Miller*, [1893] 1 Q. B. 327.

(*t*) See Williams (10th ed.) 758.

(*u*) 46 & 47 Vict. c. 52.

(*r*) *Re Heywood*, [1897] 2 Ch. 593.

(*x*) 51 & 52 Vict. c. 62, s. 1 (1); but query whether the priority of the Crown is affected by s. 10 of the Judicature Act, 1875, *post*, p. 330.

By sub-s. (2) the foregoing debts rank equally between themselves. The Act, however, by s. 2 (1), is without prejudice to the Friendly Societies Act, 1875, and shall not affect the priority given to the payment of funeral and testamentary expenses by s. 125 of the Bankruptcy Act, 1883 (y), in the administration in bankruptcy of the estate of a person dying insolvent.

(d) Sums not exceeding £100 in respect of workman's compensation.

By s. 5 (8) of the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), the amount, not exceeding £100, due in respect of any compensation is to be included among debts having priority under the Preferential Payments in Bankruptcy Act, 1888.

SECT. 8.—Of Judgments.

Judgments are next in priority of payment and the privilege extends to judgments in all Courts of Record (z).

Judgments obtained against testator or intestate.

With regard to judgments obtained against the testator or intestate in his lifetime, priority of date is not material but he who first sues out execution must be preferred; and before any execution sued, it is at the election of the executor or administrator to pay whom he will first (a).

Position of surety after satisfying judgment.

A surety who has satisfied a judgment obtained by the creditor against the debtor and his sureties is entitled to stand in the place of the judgment creditor, not only against the estate of the principal debtor, but also against the estate of a co-surety to obtain repayment of what he has paid in excess of his fair contribution; and to have priority over the unsecured creditors of the deceased, even in the administration of his estate by the Court, since the unsecured creditors are in no worse position than if the judgment creditor had exhausted his whole claim by enforcing it against the deceased's estate; and there is no occasion for the surety to obtain an assignment of the judgment in order to gain priority (b).

Effect of Land Charges Act, 1900, as to unregistered judgments.

Under s. 8 of 23 & 24 Vict. c. 38, a judgment registered against the testator or intestate unless registered as not

(y) 46 & 47 Vict. c. 52, s. 125 (7).

(z) Williams (10th ed.) 762.

(a) Williams (10th ed.) 766.

(b) *Re M'Myn*, (1886) 33 C. D. 575.

entitled in the administration of the deceased's estate to any preference over the simple contract debts of the deceased (c). This Act is repealed by s. 5 of 63 & 64 Vict. c. 26 (the Land Charges Act, 1900) as from the 1st July, 1901. Notwithstanding s. 38 of the Interpretation Act, 1889 (d), it may be contended that the effect of the repeal is to leave or revive the common law priority of an unregistered judgment unrestricted by any condition as to registration, and until this question has been judicially determined it would not be safe to prefer a simple contract debt to an unregistered judgment (e).

With regard to judgments recovered against an executor or administrator they are entitled to payment according to their respective dates out of legal assets (f).

Judgments obtained against personal representative.

Mode of pleading.

If the executor or administrator has not assets to satisfy the debt upon which an action is brought against him, he must take care to plead *plene administravit* or *plene administravit præter*, etc., otherwise if the estate of the deceased is insufficient to satisfy the judgment, unless it is of assets *in futuro*, he will be compelled to do so *de bonis propriis* (g).

Where the Court is satisfied that the defendant has duly administered all assets come to his hands it would seem that the defendant is entitled to his costs of action against the plaintiff, and the plaintiff, where the debt is undisputed, is entitled to judgment for the same with his costs of action as against future assets, *quando acciderint* (h).

Costs of action.

Since 32 & 33 Vict. c. 46 (i), which abolished the distinction between specialty and simple contract debts, a judgment

(c) *Van Gheluive v. Nerinckx*, (1882) 21 C. D. 189.

(d) 52 & 53 Vict. c. 63, and cf. *Mirfin v. Attwood*, (1869) L. R. 4 Q. B. 333 (Hannen, J., *diss.*)

(e) *See post*, p. 1024.

(f) *Dollond v. Johnson*, (1854) 2 Sm. & G. 301; *see post*, p. 344, as to distinction between legal and equitable assets.

(g) *See ante*, p. 318; as to the defences which executors or administrators should plead, *see Williams* (10th ed.) 1583; *Bullen & Leake*

(6th ed.), pp. 649 *et seq.*; *Re Marvin* [1905] 2 Ch. 490; and *see Lacons v. Warmoll* [1907], 2 K. B. 350, 365, per Buckley, L. J., as to remedy of creditor against one of several executors and form of judgment.

(h) *See Ann. Prac.* 1908, p. 124, where also the different forms of judgment against executors or administrators, according to whether they show *plene administravit* or not, are given.

(i) *Post*, p. 326.

against the legal personal representative for a simple contract debt will obtain priority over specialty debts, but it is otherwise prior to the Act (*k*).

In the administration by the Court of an insolvent estate judgment creditors will be paid *pari passu*, and not in priority of time (*l*), and rateably with other creditors (*m*).

In administration by the Court of insolvent estate, judgment and other creditors are paid *pari passu*.

Judgment recovered under 3 & 4 Will. IV. c. 42 s. 2, has no priority.

Order under Ecclesiastical Dilapidations Act, 1871, gives no priority.

By 3 & 4 Will. IV. c. 42, s. 2, damages under the Act in an action against executors or administrators of any deceased person for injury committed by him in his lifetime to another in respect of real or personal property are payable in the order of administration as the simple contract debts of such person.

Also where the bishop has, under s. 34 of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 48), made an order stating the cost of the repairs for which the personal representatives of a late incumbent are liable, the sum so stated is, under s. 36, a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors (*n*).

Effect of death between verdict and judgment.

Ord. 17 of R. S. C. provides that there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death.

How judgments are to be dated :
when pronounced in Court ;
when made in Chambers.

A judgment pronounced in Court when entered relates back to and is to be dated the day on which it was pronounced, unless the judge should direct it to be ante-dated or post-dated (*o*). But judgments not pronounced by the Court or a judge in Court, but made in Chambers are dated as of the day on which the requisite documents are left with the proper officer for the purpose of entry (*p*).

Where between the trial of an action and the delivery

Effect of death between trial and judgment.

(*k*) *Re Williams' Estate*, (1872) L. R. 15 Eq. 270.

(*l*) *M'Causland v. O'Callaghan* [1904], 1 I. R. 376.

(*m*) *Post*, p. 329.

(*n*) *Re Monk*, (1887) 35 C. D. 583.

(*o*) Ord. 41, r. 3 ; and see *Guardians of West Ham v. Churchwardens of Bethnal Green*, [1895] 1 Q. B. 662.

(*p*) Ord. 41, r. 4. Filing is now substituted for entry.

of judgment one of the defendants dies, the Court has jurisdiction to date the judgment as of the last day of the trial (q).

Where the death happens between interlocutory and final judgment the judgment is entered up against the executor or administrator (r).

Under Ord. 42, r. 28, if any change has taken place by death in the parties liable to execution, or where a party is entitled to execution upon a judgment of assets *in futuro*, an order for leave to issue execution is necessary. Leave given under this rule does not operate as a judgment against the executor or administrator, or enable the judgment creditor to obtain a charging order against the executor or administrator in respect of the judgment debt of the deceased (s).

Up to the Act 23 & 24 Vict. c. 88, there were provisions that a judgment should not affect lands unless it was registered. The Act 23 & 24 Vict. c. 88, added the provision that a judgment should not affect lands until execution had been issued, and the judgment and writ of execution should both be registered. The object was to prevent the issuing of writs and the non-execution of them and to protect purchasers from that state of things. The Act 27 & 28 Vict. c. 112, provided that no judgment or writ should affect land until the land had been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority. But it was held that since 27 & 28 Vict. c. 112, when land had been actually delivered in execution by writ of *elegit*, or other lawful authority, it was unnecessary to register the judgment, writ, or other process of execution, except for the purpose of obtaining under s. 4 of that Act a summary order for sale, for which purpose registration pursuant to s. 8 of the same Act was necessary (t).

Now by s. 2 of the Land Charges Act, 1900 (63 & 64 Vict. c. 26), a judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, whether

Effect of death between interlocutory and final judgment.

When leave to issue execution is necessary:

does not operate as a judgment against personal representative.

How and when judgment operates as a charge on land.

(q) *Turner v. L. & S. W. Ry. Co.*, 385, 386.

(1874) L. R. 17 Eq. 561. *Ecroyd v. Coulthard*, [1897] 2 Ch. 554.

(r) *Smith v. Eyles*, (1742) 2 Atk.

(s) *Stewart v. Rhodes*, [1900] 1 Ch. 386.

(t) *Re Pope*, (1886) 17 Q. B. D. 743.

obtained or entered into before or after the commencement of the Act, shall not operate as a charge on land, or on interest in land, or on the unpaid purchase-money for land unless and until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51).

SECT. 4.—Of Recognizances and Statutes.

Rank next
after judgments.

Recognizance,
nature of.

Recognizances and Statutes rank next in priority after judgments (u).

A recognizance is an obligation of record; it may be entered into by the party before a Court of Record, or before a magistrate duly authorised, conditioned for the performance of a particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like (x).

A recognizance to constitute a record must be enrolled.

Recognizances rank equally as against the personal estate of the testator, and the executor may prefer a subsequent to a prior recognizance (s).

Statutes,
nature of.

Statutes, which were statutes merchant, statutes staple, and recognizances in the nature of statutes staple, have fallen into disuse (a).

SECT. 5.—Of Specialty and Simple Contract Debts.

Formerly
specialty
debts had
priority out of
legal assets.

Formerly specialty debts, i.e., debts on bonds and contracts under seal, took priority over debts by simple contract. But this rule applied only to legal assets. It was a rule of equity that equitable assets were to be applied *pari passu* to the payment of all specialty as well as simple contract debts in equal shares and proportions (b).

The priority, however, was abolished by Hinde Palmer's Act, 1869.

Act of
Hinde Pal-
mer's Act,
1869.

(u) Williams (10th ed.) 767.

(x) *Ibid.*; and see 2 Bl. Com. 341.

(y) Glynn v. Thorpe, (1817) 1 B. & Ald. 153.

(z) Williams (10th ed.) 770.

(a) For information relating to

securities by Statute, see Williams (10th ed.) 768 *et seq.*

(b) Per Sir J. Romilly, M.R., Markwell v. Markwell, (1864) Beav. 12, 18.

Act, 1869 (32 & 33 Vict. c. 46), which provides that all the creditors of any person dying on or after the 1st January, 1870, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, but without prejudice to any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt.

The Act having placed the simple contract creditor and the specialty creditor on an equal footing *inter se* in the administration of an estate, the executor or administrator in the exercise of his administrative right to prefer one creditor to another may now pay a simple contract creditor in priority to a specialty creditor of the testator (c).

Right to prefer simple contract to specialty creditor.

Rent, though not a specialty debt, had formerly all the privileges of a specialty debt, and consequently it was held in *Re Hastings* (d) that it was within the meaning of *Hinde Palmer's Act*, and was no longer entitled to priority in payment over simple contract creditors.

Effect of Act on priority of rent.

Apart from s. 10 of the Judicature Act, 1873, the equitable rule of administration prefers debts for value to debts for the same or a higher class not for value, which in all other respects stand on the same footing. But a voluntary bond assigned for value stands upon the same footing as a bond originally given for value upon the ground of an assignee for value having a better equity (e). Persons entitled under a voluntary covenant have the right to prove against all the assets of the covenantor (f), and to have the estate marshalled in their favour, and a deed void as against all the creditors under 18 Eliz. c. 5 is equally void against voluntary creditors of the deceased, since a voluntary debt being a good debt in a Court of Law there is no reason why, for the purposes of the

Equitable rule as to voluntary creditors.

(c) *Re Samson*, [1906] 2 Ch. 584, overruling *Re Hankey*, [1899] 1 Ch. 541, in this respect.

(d) (1877) 6 C. D. 610.

(e) *Payne v. Mortimer*, (1859) 4 De G. & J. 447, and cf. *Halifax Joint*

Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31.

(f) *Hales v. Cox*, (1863) 32 Beav. 118; *Mallott v. Wilson*, [1903] 2 Ch. 494.

statute of Elizabeth, it should not be held a good debt in the Court of Equity (g).

It would seem also that a voluntary debt has priority over an allowance of interest under Ord. 55, r. 62, on a debt carrying interest, since the allowance of interest is a benefit given to the creditor out of the fund which, but for the Ord. would have gone to the debtor (h).

Payee of promissory note without consideration has no claim.

The payee of a promissory note for which there was no consideration is not in the same position as the payee of a voluntary bond, even in the administration of a solvent estate, since he cannot maintain an action at all (i).

Nor payee of bond *ex turpi causa*.

A bond *ex turpi causa* is void (k), and therefore cannot be treated as a voluntary bond.

Effect of s. 10 of the Judicature Act, 1875, as to voluntary creditor.

The effect of s. 10 of the Judicature Act, 1875, is to introduce into the administration by the Court of the estates of deceased insolvents the rule in bankruptcy that voluntary creditors are to be paid *pari passu* with creditors for value (l).

SECT. 6.—Of Contingent Debts.

Distinction between future and contingent debts.

There is a distinction between future and contingent debts. A recognizance for payment of a debt at a day certain though future is of the same class with other recognizances. But with respect to contingent debts, since the executor could not generally pay anything until the contingency had occurred, it was held they should not stand in the way of debts of inferior degree, and this applied equally to recognizances and specialties; but as soon as the contingency has happened by a breach of the condition, the securities stand in the same rank as other debts (m).

(g) *Markwell v. Markwell*, (1864) 34 Beav. 12; *Adams v. Hallett*, (1868) L. R. 6 Eq. 468.

(h) *Garrard v. Lord Dinorben*, (1846) 5 Hare, 213.

(i) *Re Whitaker*, (1889) 42 C. D. 119.

(k) *Robinson v. Gee*, (1749) 1 Ves. Sen. 250.

(l) *Re Whitaker*, [1900] 2 Ch. 676; [1901] 1 Ch. 9; see *post*, p. 329.

(m) See *Williams* (10th ed.) 773 *et seq.*, and see *post*, pp. 330, 347.

SECT. 7.—*Of the Effect of s. 10 of the Judicature Act, 1875.*

Sect. 10 of the Judicature Act, 1875, provides that in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, may come in under the decree or order for the administration of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

Effect of s. 10
of the Judica-
ture Act, 1875.

Prior to this Act the rules applied by the Court of Chancery in administering an insolvent estate differed in many respects from those applied by the Court of Bankruptcy. In particular in chancery secured creditors were entitled to a dividend on the full amount of their debts, whereas in bankruptcy secured creditors only proved for the balance after valuing their securities. Moreover in bankruptcy all creditors, including judgment creditors, are paid rateably and not in priority of time, and voluntary creditors are paid *pari passu* with creditors for value (n).

As to valuing
securities.

As to
judgment
creditors.

As to volun-
tary creditors.

A claim by lessees against an assignee of a lease under a covenant for indemnity by the assignee against breaches of covenants in the lease was held provable in the bankruptcy of the assignee (o), and therefore such a claim is provable against the assets of the deceased assignee in the administration by the Court of his insolvent estate.

As to claim by
lessee under
covenant for
indemnity.

(n) *Re Whitaker*, [1900] 2 Ch. 676, 677, per Cozens-Hardy, J.; (C. A.) [1901] 1 Ch. 9; *McCausland v.*

O'Callaghan, [1904] 1 I. R. 376.

(o) *Hardy v. Fothergill*, (1888) 13 App. Cas. 351.

As to claim by company for unpaid calls and liability to future calls.

So also it has been held that a company may prove in administration by the Court of the estate of a deceased shareholder, whose estate is insolvent, not only for unpaid but also for the estimated value of the liability to future in respect of the shares standing in his name (*p*).

Where, however, the estate is solvent the cases establish the practice of allowing distribution without regard to existence of contingent liabilities—the order of the Court sufficiently protecting the personal representative, and creditor, on the contingency happening, being left to the remedy of following the assets (*q*).

As to claim for estimated value of an annuity.

In the case of an annuity payable under a covenant by a testator with trustees, so long as no payment is in arrear there is no right to bring an action at law against the executors, and therefore, no right to an order for the administration of the estate, although the estate is insufficient to pay the estimated value of the annuity as well as other debts and liabilities. If an administration order is obtained by some other person the trustees would be entitled to prove for the estimated value of the annuity (*r*).

So an administratrix, an annuitant under covenant by a testator, whose estate was insolvent and was being administered by the Court, was held entitled to retain all arrears falling due during administration, and to prove for the value of the future annuity (*s*).

Sect. 10 of Act 1875 only applies in administration of assets by the Court.

Sect. 10 of the Judicature Act, 1875, has not in any way affected the administration of assets except in legal proceedings. It leaves executors and administrators to administer assets out of Court just as they did before (*t*).

Doubtful whether it affects Crown's priority.

Although under the Bankruptcy Act, 1883 (*u*), the priority of the Crown is taken away, yet it is doubtful whether s. 10 of the Judicature Act, 1875, imports into administration proceedings in Court so much of the Bankruptcy Act, 1883, as

(*p*) *Re McMahon*, [1900] 1 Ch. 173.
(*q*) *Re King*, [1907] 1 Ch. 72, and see *post*, p. 347.
(*r*) *Re Hargreaves*, (1890) 44 C. D. 236.

(*s*) *Re Beeman*, [1896] 1 Ch. 48.
(*t*) Per Lindley, J., in *Re Hargreaves* *supra* at p. 242.
(*u*) 46 & 47 Vict. c. 52, ss. 30, 41, 150.

relates to the Crown's priority so as to bar the prerogative right of the Crown (*x*).

Sect. 10 applies to an estate of a deceased person which is sufficient for the payment in full of his debts and liabilities apart from costs of administration, but becomes insufficient by reason of such costs (*y*).

Applies to an estate becoming insufficient owing to costs of administration.

CANADIAN NOTES.

The responsibility of paying claims falls on the administrator, he must use care and judgment in considering them, and if he does so, fairly and honestly, and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay. *Re Blank Estate* (1901), 5 Terr. i R. 230.

Where a testator directed his debts to be paid out of his "estate" and bequeathed all his personalty to his wife, and directed his executors to sell such portions of his "property" as should be necessary to pay debts and to "give title," it was held that the personalty was exonerated, and that the debts were chargeable primarily upon the realty. *Harrold v. Wallis* (1864), 10 Gr. 197.

Personalty exonerated.

If creditors are paid in full and then a deficiency is discovered, the unpaid creditors can compel those paid in full to refund a sufficient amount to put all on an equal basis. *Chamberlin v. Clark* (1882), 1 O.R. 135, 9 A.R. 273.

Executors are bound to reserve sufficient assets to secure an income adequate to the payment of taxes and other necessary expenses. *Re Cameron* (1901), 2 O.L.R. 756.

(*x*) *Re Oriental Bank Corporation, Ex parte The Crown*, (1884) 28 C. D. 643, 649, and see Wil-

liams (10th ed.) 760.

(*y*) *Re Leng*, [1895] 1 Ch. 652.

EXECUTORS.

In an action for administration by a judgment creditor on a judgment recovered on a note discounted by him, which note was received by executors for the sale of personal property of the testator and endorsed "without recourse" to the plaintiff, it was held that the endorsement of the note by the executors did not make it a debt of the testator in the hands of the endorsee. *Ianson v. Clyde* (1900), 31 O.R. 579.

Land was devised to an executor to sell, if necessary, to meet any deficiency of assets for payment of debts and legacies. After the execution of the will the testator conveyed the land to the executor, who undertook to pay the purchase money, and charged himself with it in the inventory. It was held that he was liable for the amount and that it formed part of the residuary estate. *Wetmore v. Ketchum* (1862), 10 N.B.R. 408.

Executor
liable.

An estate was being administered in an action commenced in May, 1892, and a creditor brought into the Master's office in May, 1901, a claim for goods supplied to the executor between 1890 and March, 1892, for use in carrying on the hotel business of deceased under authority in his will. The executor claimed in the administration proceedings that the estate was insolvent, but in 1894, an order was made by consent for the transfer of all the assets to him personally upon his undertaking to pay or settle with all the creditors of the estate, and this order was carried out. The order contained provisions that the Master should adjudicate and settle all claims against the estate and that the executor should indemnify the estate against all such claims. It was held that a person supplying goods to an executor under such circumstances has no right against the estate, but may sue the person who incurred the debt,

and had a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred. *Braun v. Braun* (1902) 14 Man. 346.

In Ontario, Manitoba and Alberta all debts rank *pari passu*, ^{Debts rank *pari passu*.} except that existing liens are not affected. R.S.O., c. 129, s. 34; R.S.M., c. 118, s. 44; Ordinances, Alberta, 1903, 2nd Sess. c. 11, s. 44. In New Brunswick a similar enactment prevails, but debts due to the Crown are excepted. In Nova Scotia, after payment of the expense of medical and other attendances in the last illness of the deceased and funeral expenses, the wages of clerks, domestic and farm servants, and rent for a time not exceeding one year before the death of the deceased, are first paid in full, and thereafter the creditors are paid in proportion to their respective claims.

Foreign creditors of a deceased domiciled abroad are entitled to rank *pari passu* with local creditors. *Milne v. Moore* (1894), 24 O.R. 456.

Where executors paid certain promissory notes intended as a gift from the testator to the payee and such payment was made with notice of the want of consideration, it was held that the executors could not be treated as protected either by the *prima facie* presumption of a valuable consideration raised by the 30th section of the Bills of Exchange Act, 53 Vict., or by the provisions of section 31 of R.S.O., c. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient." *Re Williams* (1896), 27 O.R. 405.

In Nova Scotia and New Brunswick it is provided that where the personalty is insufficient to pay the debts the Court may grant a license to sell a sufficient amount of land for that purpose. R.S.N.S., c. 158; R.S.N.B., c. 118. It is en- ^{License to sell.}

tirely in the discretion of the Judge of Probate to grant such a license. *Re O'Sullivan* (1865), 5 N.S.R. 549.

By section 7 of the Devolution of Estates Act, R.S.O., c. 127, it is provided that the real and personal property of a deceased person comprised in any residuary devise or bequest shall, (except so far as a contrary intention shall appear from his will or any codicil thereto), be applicable ratably, according to their respective values, to the payment of his debts. This section is only applicable, however, where there are both realty and personalty in the residue. Where, therefore, a testator bequeathed all his personal estate to his son, and devised to him a farm, and devised the remainder of his real estate, to his executors upon trusts, and directed his debts to be paid out of his "estate," it was held that the debts should be paid out of personalty as far as it was sufficient. *Re Moody* (1906), 12 O.L.R. 10. See *Scott v. Supple* (1893), 23 O.R. 393.

If an administrator on competent advice pays a claim *bonâ fide* made against the estate the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back. *Mayhew v. Stone* (1895), 26 S.C.R. 58.

Taxes.

Municipal taxes although forming a charge on the land of testator, and for which the testator might have been sued in debt are not an incumbrance which a devisee of the land is to assume, but are a debt of the testator's, payable in course of administration. *Re Watkins* (1906), 12 B.C.R. 97.

Delay on the part of the executors to sell lands which by the will were saleable for the payment of debts will render the executors liable for rents and profits. *Emes v. Emes*

(1865), 11 Gr. 325. See *McMillan v. McMillan* (1874), 21 Gr. 369, where loss occurred and the executors were held not liable, but interest was held chargeable under the special circumstances.

In the administration of estates a judgment obtained against the deceased is entitled to priority over simple contract and specialty creditors. And it is not essential to the judgment that it should be docketed. An assignment thereof made by an administrator of certain estates for the benefit of certain specialty and simple contract creditors was set aside at the instance of the judgment creditor. *Frontenac Loan Co. v. Morice* (1886), 3 Man. 462.

Priority of judgment.

Executors were held personally liable on a promissory note for goods sold, although they professed to contract as executors in the body of the note and signed as executors, it appearing that the goods could not be sold nor services rendered to a person in a representative character, and the law therefore implied a personal contract to pay. *Kerr et al. v. Parsons* (1862), 11 U.C.C.P. 513.

Executors personally liable.

The granting of probate is a judicial act which cannot be ignored till set aside or repealed, and one of the main reasons why payment of a debt, under it, is held to be sufficient, is the debtor's legal liability to recognize that act. But the executor is equally bound by that act, and if he were proceeded against for a legacy, or if sued for a debt due by the deceased, he could not plead that he was not executor, any more than a debtor could, if sued by him. It seems but reasonable that the same judicial act which would protect the debtor, because he could not controvert it, would also protect the executor for the same cause. *Randall v. Delap* (1885), 18 N.S.R. 106.

Executor
estopped.

A creditor sued an executor personally in a County Court for the price of certain goods and the County Court Judge dismissed the action on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor was estopped by the course he had taken from disputing the validity of the claim against the estate in subsequent administration proceedings. *Braun v. Braun* (1902), 14 Man. R. 346.

An estate in the hands of an administrator is not liable for work done or services performed at the request of the administrator, although the estate gets the benefit of the work and services, but the administrator is liable in his personal capacity in such a case. *Farhall v. Farhall* (1871), L.R. 7 Ch. 123, followed. *Dean v. Lehberg* (1907), 17 Man. R. 64.

A certificate of a County Court judgment against A.B., administrator of the estate of X. charges A.B. personally and not the estate. *Re Joyce & Scarry* (1889), 6 Man. R. 281.

A person advancing money to pay debts is entitled to sustain a suit for administration as a creditor. *Glass v. Munsen* (1865), 12 Gr. 77.

After judgment was obtained against the executor of an insolvent estate an administration decree was made. Plaintiff applied for payment to the amount of his judgment out of funds in Court, the proceeds of the estate, and a Judge in Chambers granted his application, holding that R.S.B.C., c. 68, s. 4, did not take away the right of a judgment creditor, whose judgment was obtained before the administration decree, to be paid. On appeal to the Full Court this order was set aside, as it was doubtful if there would be funds enough

to pay the judgment in full after satisfying prior claims.
Wilson v. Marvin (1894), 3 B.C.R. 327.

As to the proper course to be taken by an administrator in Saskatchewan in paying claims and distributing surplus, see judgment of Wetmore, C.J., in *Re Mussetter* (1908), 8 W.L.R. 704.

An executor's verified account is not *prima facie* proof of his claim. The claim, if disputed, must be proved as any other claim. *Re Estate McNutt* (1892), 24 N.S.R. 264.

CHAPTER XXIV.

OF THE POWER OF PREFERENCE.

Among
creditors of
equal degree.

AMONG creditors of equal degree an executor or administrator may pay one in preference to another, and, since Hind Palmer's Act, specialty creditors and simple contract creditors being on an equal footing *inter se*, he may pay a simple contract creditor in priority to a specialty creditor(a).

Creditor
obtaining
judgment
gains priority.

If, however, a creditor obtains judgment against the executor or administrator he must be satisfied before other creditors (b), and the right of preference is thereby precluded as against him; but if before the judgment is satisfied an administration order is made the estate being insolvent he will have to come in on an equal footing with simple contract creditors(c).

After admin-
istration
order power
of preference
ceases.

After an order for administration has been made the power of preference no longer exists, but until then the Court will not on interlocutory application appoint a receiver or grant an injunction merely to prevent the executor or administrator exercising his legal right of preference(d).

Form of
creditor's
administra-
tion bond.

By the present form of bond required to be given by a creditor on a grant to him of administration he is bound to pay the debts rateably and proportionably and according to the priority required by law, not, however, preferring his own debt by reason of his being administrator(e).

This form of bond deprives the creditor administrator of the power of preferring his own debt, but it does not prevent him preferring the debt of any other creditor of the deceased(f).

(a) *Re Samson*, [1906] 2 Ch. 584, overruling *Re Hankey*, [1899] 1 Ch. 541.

(b) *Re Williams' Estate*, (1872) L. R. 15 Eq. 270.

(c) *Re Whitaker*, [1900] 2 Ch. 676, 677, (C. A.) [1901] 1 Ch. 9; *McCausland v. O'Callaghan*, [1904] 1 I. R. 376; disapproving *Smith v.*

Morgan (1880) 5 C. P. D. 337.

(d) *Re Wells*, (1890) 45 C. D. 569, and see *post*, pp. 338, 356.

(e) See Practice note (1899) W. N. 262, and Form 59 in Tr. & Co. P. P. (14th ed.), p. 798.

(f) See *Davies v. Parry*, [1899] 1 Ch. 602, 606, per Romer, J., and *Re Belham*, [1901] 2 Ch. 52.

CANADIAN NOTES.

It will be found that legislation has largely affected the power of preference in the various provinces.

The language of Townshend, J., in *Re Estate McNutt*, 24 N.S.R. at p. 268, with respect to the Nova Scotia Probate Act, probably expresses the view that will be adopted where similar statutory provisions obtain. Referring to the Act in question he says: "It provides that in the settlement of insolvent estates, after certain preferential charges are paid, the whole of the remainder of the estate, both real and personal, shall be distributed, first, by paying in full clerks, domestic and farm servants, etc.; second, all other creditors, to be paid in proportion to the amount to their respective debts. There is no exception in favour of the executor or administrator, and to recognize the existence of any such right would be in direct violation of the statute, and contrary to the whole scheme in this province for administration of estates." The learned Judge now Chief Justice of Nova Scotia, it is true, was referring to the executor's right of retainer, but it is fairly obvious that his remarks are applicable, as well, to the power of preference.

In New Brunswick the Act 26 Geo. III. c. 11, s. 18, directed the executor, where an estate is insolvent, to divide it in due proportion to and among the creditors. Consequently, in *Joseph v. McLeod*, Trin. T. (1833), Steven's Digest, N.B.R. 376, it was held that executors had no right to prefer any one creditor of an insolvent estate nor to retain the whole of their own debts of the same class.

Insolvent
estate.

Executors may pay a debt of equal degree in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another. *Commercial Bank of Canada v. Woodruff* (1863), 13 U.C.C.P. 621.

EXECUTORS.

Since 29 Viet. c. 28, s. 28, abolishing all distinction between the different classes of debts in the administration of an estate, it is no defence for an executor sued on a promissory note of his testator, that there are specialty debts unpaid more than equal to the goods administered. *Parsons v. Gooding* (1873), 33 U.C.R. 499.

Where one partner in a business died, by his will making the other his executor and residuary legatee, and the executor incumbered both his own share and that devised to him, only partly paid a legacy and was subjected to a judgment for the unpaid balance, one of the executor's creditors, mortgagee of the property, obtained judgment against him and the appointment of a receiver of his estate. The unpaid legatee claimed that his judgment, though registered subsequently to those of the other creditors, was a charge on the moneys in the receiver's hands in priority to the personal judgment creditors of the executor, and his contention was sustained. It was further held that the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, the legacy was a charge upon the realty of the testator, which operated against the mortgagees, who were shewn to have had notice of the will. *Cameron v. Harper* (1892), 21 S.C.R. 273.

An executor or administrator cannot, by paying off creditors of the estate, create a demand in his own favour that will give him a right of retainer in priority to other creditors, but may stand in the place of the creditors he has paid off. And if there prove to be a deficiency of assets, he will only be entitled to be paid *pro rata* with the general creditors. *Willis v. Willis* (1873), 20 Gr. 396.

CHAPTER XXV.

OF THE RIGHT OF RETAINER.

An executor (a) has a right to retain out of legal assets (b) for his own debt due to him from the deceased in preference to all other creditors of equal degree. For since he cannot commence an action against himself to recover his own debt, the law places him in the same position as if he had sued himself as executor and recovered his debt (c). The right to retain extends both in law and in equity to all legal assets which the executor or administrator has in his hands but not to equitable assets (d). The right, however, extends to equitable debts, that is, such as can only be effectually ascertained through a Court of Equity (e).

Right of retainer in preference to other creditors of equal degree.

Applies to legal, not equitable assets.

Where the value of the whole of the assets is less than the debt due to the executor he is not bound to realize before exercising a right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt (f).

Retainer in specie allowed where value of whole assets is less than the debt.

As to the effect of *Hinde Palmer's Act* (g) on the right of retainer, in the case of *Wilson v. Corwell* (h) a right of retainer being claimed on behalf of the estate of an executor who was a simple contract creditor and there being a specialty creditor, it was held that the assets (after payment of costs) must be apportioned on the footing of giving an equal dividend to all the creditors (specialty and simple contract); that the dividend

Effect of *Hinde Palmer's Act*.

(a) An administrator is now precluded from retaining by the form of the administration bond, see *ante*, p. 332.

(b) See *post*, p. 344, as to the distinction between legal and equitable assets.

(c) See *Williams* (10th ed.) 785, and *Re Compton*, (1885) 30 C. D. 15, 19, per Cotton, L.J.

(d) *Re Baker*, (1890) 44 C. D. 262, 272; *Re Rhodes*, [1899] 2 Q. B. 347, 354.

(e) *Re Morris's Estate*, (1874) L. R. 10 Ch. 68; and see *post*, p. 335.

(f) *Re Gilbert*, [1898] 1 Q. B. 282, and see *ante*, p. 199.

(g) *Ante*, p. 326.

(h) (1883) 23 C. D. 764.

must be paid in full to the specialty creditor; that the executor must then retain his debt out of the residue; and that the surplus (if any) must be divided equally among the simple contract creditors. This principle of distribution was followed with approval by Kay, J., in *Re Jones* (i), by Chitty, J., in *Re Briggs* (k) and by Stirling, J., in *Re Bentinck* (l); but it did not meet with the approval of the Court of Appeal in *Re Samson* (m), and although the question was not determined Fletcher Moulton, L.J., stated that he was of opinion that so far as the cases quoted suggested that under the present law two funds ought to be formed, one in respect of the specialty debts and the other in respect of the simple contract debts, those decisions are erroneous, and are in direct conflict with the provisions of Hinde Palmer's Act. In the same case Buckley, L.J., without expressing any opinion on this question, stated what he considered to be the true construction of the Act, as follows (n): "It begins by a recital which recognizes that at the date of the Act there were creditors of two classes, of which the one class had a priority over the other class: the operative part of the Act provides that there shall not be two classes in future; that a specialty shall give no priority or preference; that all creditors, specialty and simple contract, shall stand in equal degree. In other words, it was an Act which altered the rights of persons who had claims against the estate. The Act had nothing to do with administrative acts, nothing to do with that which the executor might do in administering the estate. It simply varied the rights of the persons who could claim against it. The words 'shall be paid accordingly' mean simply 'shall be paid upon the principle that there is only one class.'"

Although the right of retainer, as it produces inequality, is never assisted (o), yet it would seem (p) that Hinde Palmer's

(i) (1885) 31 C. D. 440.

(k) (1894) W. N. 162.

(l) [1897] 1 Ch. 673.

(m) [1906] 2 Ch. 584.

(n) *Ibid.* p. 593.

(o) *Hopton v. Dryden*, (1700) Prec. in Ch. 179; 2 Eq. C. 450.

(p) See observations of Kay, J., in *Re Jones*, *ubi sup.*, and other cases above cited.

Act, having augmented the fund for payment of simple contract creditors, has to this extent enlarged the right of retainer.

A right of retainer is not affected by s. 10 of the Judicature Act, 1875 (q).

Although the effect of s. 3 of the Married Women's Property Act, 1882, is to place the amount of a loan made by a married woman to her husband for the purposes of his business in an inferior class to the debts due to other creditors for value, yet this only affects her right to prove, and not her right of retainer, and, therefore, though that section, and s. 10 of the Judicature Act, 1875, prevents her from proving for such a loan in the administration of her deceased husband's estate (if insolvent) in competition with his creditors for value, yet, if she is her husband's executrix, she can as against those creditors retain the amount of the loan out of assets in her hands as executrix (r).

The right of retainer is not restricted to an ascertained debt but extends to a debt which requires accounts to be taken (s), also to a claim for damages arising from the breach of a pecuniary contract for which there is a certain standard or measure, for instance, damages in case of breach of covenant to assign a policy or to replace furniture (t). But damages that are in their nature arbitrary, such as damages founded upon torts, cannot be retained (u).

An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor, or is paid into Court during his lifetime (x); and if an executor asserts a right of retainer, but dies without having exercised it, whether he were the sole executor (y), or left another executor of the original testator surviving (z), his representatives may exercise the right for

Retainer not affected by s. 10 of the Judicature Act, 1875.

Right exercisable by married woman against deceased husband's creditors for loan to husband for purposes of his business.

Right not restricted to an ascertained debt.

Right must be asserted during lifetime, but having asserted it executor's representatives may exercise it.

(q) *Lee v. Nuttall*, (1879) 12 C. D. 61.

(r) *Re Ambler*, [1905] 1 Ch. 697, following *Re May*, (1890) 45 C. D. 499, and *Re Leng*, [1895] 1 Ch. 652.

(s) *Re Morris's Estate*, (1874) L. R. 10 Ch. 68.

(t) *Re Compton*, (1885) 30 C. D. 15.

(u) *Loane v. Casey*, (1770) 2 W. Bl. 965.

(x) *Re Compton*, *ubi sup.*

(y) *Ibid.*

(z) *Wilson v. Coxwell*, (1883) 23 C. D. 764.

the benefit of the estate of the deceased executor ; but only as to anything which came into the actual possession or under the actual control of the deceased executor, or which was paid into Court during his lifetime.

No retainer
out of assets
under 3 & 4
Will. IV.
c. 104,

Real estate not charged with payment of debts is by 3 & 4 Will. IV. c. 104 made assets to be administered in Courts of Equity, and therefore being equitable assets an executor has no right of retainer against it (a).

nor out of
proceeds of
real estate
directed to
be sold.

So also an estate devised to an executor upon trust for sale for payment of debts is equitable assets against which no right of retainer exists (b).

Land Trans-
fer Act, 1897,
confers no
new right of
retainer.

The Land Transfer Act, 1897, which vests real estate of a deceased person in his personal representative, and provides for the administration of real estate in the same manner, subject to the same liabilities for debts, costs and expenses, and with the same incidents as if it were personal estate, does not confer any new right of retainer or priority in favour of the personal representative, by reason of the comprehensive over-riding proviso at the end of s. 2, sub-s. 8, that nothing shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies (c).

Right of heir
or devisee
to retain.

It may be convenient here to mention that formerly the heir or devisee had a similar right to the executor or administrator of retainer out of legal assets in respect of a specialty, and for similar reasons. The heir could be sued at law in respect of any debt due on specialty in which the heirs were bound, and was liable to the extent of the real estate descended to him. The devisee under the Act 3 & 4 Will. and Mary c. 14, and ultimately under 11 Geo. IV. and 1 Will. IV. c. 47, stood in the same position as the heir. The specialty creditor could bring an action at law under the statute against the devisee and recover up to the value of the devised estate. The devised estate was legal assets, because it could be got at by

(a) *Walters v. Walters*, (1881) 18 Eq. 570.
C. D. 182.

(b) *Bain v. Sadler*, (1871) L. R. 12

(c) *Re Williams*, [1904] 1 Ch. 52.

an action at law (*d*). But where lands were charged by Will with payment of debts, if the legal estate descended the heir had no right of retainer; and if the estate was devised subject to a charge of debts the devisee also had no right of retainer (*e*). When the stat. 3 & 4 Will. IV. c. 104, was passed, real estate was not assets at law for the purpose of paying simple contract creditors, and the statute did not make the real estate legal assets—it was only assets to be dealt with in a Court of Equity. But the common law right of action given to a creditor by specialty in which the heirs are bound, is not taken away, and therefore does not take away the right of the heir or devisee to retain in respect of a specialty in which the heirs are bound (*f*). However, since the Land Transfer Act, 1897, where that Act applies, and so long as the land is vested in the personal representative, it would seem the heir or devisee cannot have any right of retainer.

There is no right of retainer by an executor out of property which belonged to his testatrix for her separate use (*g*); but the reason would seem to be that separate use being a creature of equity the creditor had no legal claim against the property, but only an equitable right, and therefore equitable principles apply (*h*).

Separate property of testatrix is not subject to retainer.

An executor's right of retainer extends only to funds actually or constructively in his possession.

Funds to which right extends.

The right of retainer may be asserted notwithstanding there has been a decree for administration (*i*), and where money instead of being paid to the executor is paid into Court under an order in the administration action it is as if the executor himself had received the money and had been ordered to pay it into Court. The Court never allows an order for payment into Court to prejudice the rights of the person

As to funds in Court.

(*d*) *Re Illidge*, (1884) 27 C. D. 478, 483, per Lindley, L.J.; *Re Lacey*, [1907] 1 Ch. 330, 347, per Farwell, L.J.

478, 482.

(*g*) *Re Poole's Estate*, (1877) 6 C. D. 739.

(*h*) See *post*, p. 346.

(*e*) *Re Illidge*, (1883) 24 C. D. at p. 660, per Chitty, J.

(*i*) *Nunn v. Barlow*, (1824) 1 S. & S. 588; *Davies v. Parry*, [1899] 1 Ch. 602; *Re Belham*, [1901] 2 Ch. 52.

(*f*) *Re Illidge*, (1884) 27 C. D.

E.

paying it in, and the fund is treated as being in the possession constructively of the executor to enable him to exercise a right of retainer out of the fund (*k*).

But where the insolvent estate, the subject of an old administration suit, became entitled to a fund in Court to the credit of another suit, and the fund was transferred from the one credit to the other, it was held that the executor could not be treated as having had the fund constructively in possession, and that there could be no right of retainer out of it (*l*).

The Court will not order a fund to be paid out to the executor or administrator having the legal title to a statute barred debt merely in order to enable him to acquire a right of retainer thereout (*m*).

The executor's right to retain may, like any other, be lost, forfeited, or released, but his right is not relinquished by himself, as plaintiff, suing on behalf of himself and all other the creditors, and submitting to account in the ordinary form and to an order that the estate shall be applied in payment of debts in a due course of administration (*n*).

After a receiver is appointed there is no right of retainer out of assets collected by the receiver, but if the executor had received assets before the appointment of a receiver his right of retainer is not lost by the fact that he afterwards paid over the same to the receiver (*o*).

The Court will not interfere with the right of retainer by appointing a receiver on interlocutory application before decree in an administration action, where it is not shown that the assets are in danger of being wasted (*p*).

The executor's right is not lost by an order made under s. 125, ss. 1, 2, of the Bankruptcy Act, 1883, for the administration of the estate of an insolvent testator, since the effect of

Right not lost by order for administration.

No right of retainer out of assets collected by receiver in the action.

Court will not interfere with right by appointing receiver on interlocutory application.

Right not lost by order under s. 125 of the Bankruptcy Act, 1883.

(*k*) *Richmond v. White*, (1879) 12 C. D. 361; *Re Langley*, (1899) W. N. 23.

(*l*) *Pulman v. Meadows*, [1901] 1 Ch. 233.

(*m*) *Trevor v. Hutchins*, [1896] 1 Ch. 844.

(*n*) *Ex parte Campbell*, (1880) 16 C. D. 198.

(*o*) *Re Harrison*, (1886) 32 C. D. 325.

(*p*) *Re Wells*, (1890) 45 C. D. 569; see *post*, p. 356.

the order is to vest in the official receiver the balance of the assets after the executor has retained his debts; and if an executor, not knowing his rights, has paid over the whole of the assets to the trustee in the bankruptcy and has proved for his debt, so long as the trustee as the officer of the Court still has the money in hand he will be ordered to repay the amount the executor was entitled to retain on the executor withdrawing his proof (q).

Mere delay does not affect the executor's right to retain, provided the delay can be explained, and there are assets against which he can exercise his right; since the general law is that any person claiming to be a creditor is allowed to come in and prove on reasonable terms at any time, so long as there is anything against which his proof can usefully be established (r). An executor is not bound to assert his right before occasion arises (s).

Right not lost by mere delay so long as there are assets available.

An executor may, however, lose his right where the exercise of it would be to defeat an inquiry directed as to the persons interested in a fund in Court which had been directed in his presence (t).

What amounts to waiver of the right.

The right of retainer has priority over the costs of the administration action (u); and when an estate has been fully distributed *bonâ fide* and without undue haste the right will prevail as against a debt of a higher degree of which the executor has no notice at the time of distribution (x).

Right has priority over costs of administration action, also over debt of higher degree of which executor had no notice at time of distribution.

The right of retainer exists where the right to receive the debt and the liability to pay the same are centred in the same person. In *Cockroft v. Black* (y), an executrix being entitled beneficially to the debt due from the testator was allowed to retain, although there was in existence a trustee of the debt for her. But it was laid down in *Re Dunning* (z) that the right established by this decision ought to be adhered to, but it

Right to receive and liability to pay must be centred in same person.

(q) *Re Rhoades*, [1899] 2 Q. B. 347.

C. D. 361.

(r) *Re Giles*, [1896] 1 Ch. 956.

(x) *Re Fludyer*, [1898] 2 Ch. 562.

(s) *Re Rhoades*, *ubi sup.*

(y) (1725) 2 P. Wms. 299.

(t) *Trevor v. Hutchins*, [1896] 1 Ch.

(z) (1885) 54 L. J. Ch. 900; see also

844.

Re Hayward, [1901] 1 Ch. 221.

(u) *Richmond v. White*, (1879) 12

ought not to be extended to a case where the executrix claimed the right on behalf of her life interest and also on behalf of her children out of the estate of a testator who had misappropriated the settlement funds, there being trustees of the settlement who were competent and bound to sue for and obtain judgment against the executrix for the amount, or to take proceedings for administration of the estate.

Retainer for debts of which executor is trustee.

An executor or administrator may retain not only the debts which he claims beneficially but also for those to which he is entitled as trustee (a).

Personal representative of deceased trustee, unless he elect to act as trustee, cannot be compelled to exercise right.

A personal representative of a deceased trustee has an absolute right to decline to accept the position and duties of trustee if he chooses so to do (b), and unless he elects to act as trustee he cannot be ordered to exercise in favour of the *cestuis que trust* his right of retainer; since the right of an executor to retain is not a right which he holds on trust, but is a personal privilege of his own (c). If, however, the legal personal representative is trustee he is compellable to exercise this right, because his position as trustee for the *cestuis que trust* is superadded to his position as legal personal representative of the deceased trustee (d).

One of two executors who is one of two joint creditors may retain.

One of two executors who is also one of two joint creditors has a right of retainer in respect of his joint debt, and it makes no difference that the creditor asserting the right is a trustee with the other creditor, since as trustee he is bound to exercise the right if the *cestuis que trust* require him to do so (e).

One of two cannot retain to the prejudice of the other.

Where there are co-executors or co-administrators, each being a creditor of the deceased, the one cannot retain for his own debt to the prejudice of the other; for several joint executors or administrators are considered but as one person in law; the possession of one is the possession of the other; the receipt of

(a) Williams (10th ed.) 791; Sander v. Heathfield, (1874) L. R. 19 Eq. 21, 26; Davies v. Parry, [1899] 1 Ch. 602, 605.

(b) Legg v. Mackrell, (1860) 2 D. F. & J. 551; and see *ante*, p. 3.

(c) *Re Benett*, [1906] 1 Ch. 216.

(d) Davies v. Parry, *ubi sup.*, at p. 607.

(e) Crowder v. Stewart, (1880) 16 C. D. 368; *Re Hubback*, (1885) 20 C. D. 934.

one is the receipt of the other ; and, therefore, the retainer of one must be considered as the retainer of the other, and must enure, for their mutual benefit, in the discharge of the debts of both in proportion (f).

Where a mortgagor dies insolvent, and the mortgagee then realizes his security and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate ; the mortgagee being merely in the position of a bare trustee of the surplus for the estate. And if the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, whether the debt is due to himself individually or to a partnership of which he happens to be a member. The mere possession of assets gives no right of preference to a creditor (g).

Mortgagee becoming executor for mortgagor has no preference for an unsecured debt.

But where the executor has a legal preference, he can exercise that right on behalf of a firm of which he is a partner and accordingly retain on behalf of himself and partners (h), but should he die before exercising the right, since the legal interest in the debt thereupon devolves on the surviving partner, the right of retainer no longer exists (i).

Executor having legal preference may exercise it on behalf of a firm of which he is a partner.

Where a creditor had proved his debt in an administration action and then died having bequeathed the debt to the executrix of the testator in the cause, it was held that she had no right of retainer in respect of it (k). The reason for allowing a retainer, viz., that the executor cannot sue himself and should in consequence be allowed a preference, would seem to

No retainer for debt acquired by assignment after testator's death.

(f) Williams (10th ed.) 796.

(g) Talbot v. Frere, (1887) 9 C. D. 568 ; and see *Re Gedney*, [1908] 1 Ch. 804.

(h) Per Wigram, V.-C., in *Burge v. Brutton*, (1848) 2 Hare, 373, 376 ;

and per Jessel, M.R., in *Talbot v. Frere*, *ubi sup.*, at p. 575.

(i) *Burge v. Brutton*, *ubi sup.*

(k) *Jones v. Evans*, (1876) 2 C. D. 420.

have no application to such a case; nor to the case of an executor acquiring by assignment a debt after his testator's death. The Judicature Act, 1873, s. 25 (6), makes the assignment of a chose in action carry the right for the assignee to sue in his own name, subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed (l).

Executor
being surety
of testator
may retain.

Where an executor was surety for the testator, and pays the debt after the testator's death, it becomes a simple contract debt due from the testator to him, which he is at liberty to pay himself or retain (m).

The right of indemnity belonging to an executor who is surety for an unpaid debt of his testator, creates an equitable debt in respect of which the executor may exercise the right of retainer, and provision will be made for payment of the debt before the rest of the estate is distributed among the creditors *pro rata* (n).

Adminis-
trator *d. m. a.*
may retain
for infant's
debt.

In the case of an administration granted during the minority of an infant next-of-kin, if the infant in point of right had a title to retain, the administration being granted to another during his minority will not prejudice that right (o).

So adminis-
trator for use
of a lunatic
may retain
for lunatic's
debt.

The same principle applies to an administration granted to another for the use of a lunatic (p).

In the same cases the administrator, under the old form of bond, could have retained for his own debt also (q).

Executor
may retain
for a statute
barred debt.

An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations; and on the same principle may have a right to retain his own just debt, although barred by the statute (r). This is a single exception to the general rule that it is a devastavit if an

(l) Cf. *Re Milan Tramways Co.*, (1884) 25 C. D. 587.

(m) *Boyd v. Brooks*, (1865) 34 Beav. 7, and on app. 34 L. J. Ch. 605.

(n) *Re Giles*, [1896] 1 Ch. 956; and see per North, J., in *Re Binna*, [1896] 2 Ch. 584, 588.

(o) *Franks v. Cooper*, (1799) 4 Ves. 763.

(p) *Ibid.*; and see Williams (10th ed.) 793.

(q) Williams (10th ed.) 793; and see *ante*, p. 331.

(r) *Stahlschmidt v. Lett*, (1853) 1 Sm. & G. 415; *Hill v. Walker*, (1858) 4 K. & J. 166; and see per Kekewich, J., in *Budgett v. Budgett*, [1895] 1 Ch. 202, 215, 216.

executor or administrator pay that which need not be paid, and it is not to be extended, and therefore an executor or administrator would commit a devastavit in paying a debt to a creditor who is prevented from enforcing it by the Statute of Frauds, and for the same reason cannot retain such debt if due to himself(s).

Although an executor may retain for his own debt out of legal assets, and is entitled to be recouped in full in priority to other creditors for sums he may advance in paying creditors, yet he has no priority in respect of debts of his testator for which he makes himself personally liable(t).

Executor has no priority for debts of testator for which he makes himself personally liable.

CANADIAN NOTES.

The right of retainer, though well settled in England, does not exist in all the provinces of the Dominion, but has been affected by various provisions of the Probate Acts.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full, and, as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross* (1881), 29 Gr. 385.

Insolvent estate.

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established, and though his claim would otherwise be barred by the Statute of Limitations. *Kline v. Kline* (1871), 3 Ch. Ch. 161. The right of retainer, out of legal assets, applies to equitable as well as to legal debts, especially in a case where there is no competition of creditors. *Ibid.*

An executor may take the personal property at its value for a debt due by the estate to him, or purchase the same at public auction in lieu of money due him. *Yost v. Crombie*

(s) *Re Rowson*, (1885) 20 C. D. 358. (t) See *post*, p. 385.

(1859), 8 U.C.C.P. 159. He may retain a debt barred by the Statute of Limitations. *Crooks v. Crooks* (1854), 4 Gr. 615. *Emes v. Emes* (1865), 11 Gr. 325. *Quære*, Where the personal estate is exhausted, can he retain such a debt out of the proceeds of real estate? *Crooks v. Crooks, supra*.

An executor or administrator cannot, by paying off creditors, create a demand in his own favour that will give him a right of retainer in priority to all other creditors. All that he will be entitled to under such circumstances will be to stand in the place of the creditors he has paid off, and if there prove to be a deficiency of assets he will only be entitled to be paid *pro rata* with the general creditors of the estate. *Willis v. Willis* (1873), 20 Gr. 396.

Confession of judgment.

An administrator, being a creditor of the intestate, in order to secure his own debt, confessed judgment for such debt to his friend the plaintiff, to whom the intestate owed nothing, with the understanding that the land in his hands should be sold under the judgment, and the proceeds paid over to him by the plaintiff. The Court, on the application of the tenant of the land, set aside the judgment and execution. *Bonistiel v. McMaster* (1840), 6 U.C.Q.B. (O.S.) 32.

An executor who, by his own act, has put the property of the estate beyond his possession and control, and treated it as vested in others, has no longer any right of retainer. Possession or its equivalent are necessary to support the right. *In re Starr, Starr v. Starr* (1902), 2 O.L.R. 762. In this case the executor allowed the land to pass to a devisee. *Sed quære*, whether the right of retainer should be extended to land. See *In re Williams, Holder v. Williams* (1904), 1 Ch. 52.

Where the plaintiff obtained judgment against the defendant as an executor of the deceased, an insolvent, and afterwards an administration decree was made and plaintiff applied for payment of the amount of his judgment out of funds in Court, being proceeds of the estate, it appearing that there might not be sufficient funds to satisfy an undecided right of retainer by the executor, and other judgments,

it was held that payment out of Court to plaintiff should be postponed till final distribution of the estate under the decree in the administration suit. *Wilson v. Marvin* (1894), 3 B.C.R. 327.

An administrator has a right to retain a debt due to him by the estate although it is barred by the Statute of Limitations. *Re Easton* (1906), 4 W.L.R. 23.

It has been held in New Brunswick, that, as the Act 26 Geo. III. c. 11, s. 18, directed executors, where an estate is insolvent, "to divide it in due proportion to and among the creditors," it was their duty to pay debts according to the common law priority of classes, and *pari passu* in each class, and that they had no right to pay any one creditor in preference, nor to retain for the whole of their own debts of the same class. *Joseph v. McLeod*, Trin T. (1833), Steven's Digest, N.B.R. 376.

The Nova Scotia Statute, c. 100, R.S.N.S., 5th Series, provided that, in the settlement of insolvent estates, after payment of certain preferential claims, the whole of the remaining estate, both real and personal, should be distributed in manner directed by the statute. There was no exception in the statute in favour of the executor or administrator, and the Supreme Court of Nova Scotia has forcibly stated, in *Re Estate of McNutt* (1892), 24 N.S.R., at p. 268, per Townshend, J., that "it would be a waste of time to refer to the numerous authorities cited to us on the argument as to the right of retainer in England, which no one doubts, but which obviously have no application here."

No right
of retainer.

CHAPTER XXVI.

OF THE DISTINCTION BETWEEN LEGAL AND EQUITABLE ASSETS.

Legal assets
subject to
rules of
priority of
creditors,
equitable
assets not.

What are
legal assets?

Money pay-
able under
contract made
by deceased.

WITH regard to the rules of priority among creditors, there is a distinction between legal and equitable assets. Legal assets are administered in accordance with the rules of priority already explained, but equitable assets are to be administered upon principles of equality without regard to legal priorities(a).

If a creditor brings an action at law against the executor or administrator and he pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets he has received, and whatever assets the Court of Law, in trying that question, would charge him with, must be regarded as legal assets; all others would be equitable assets. The general principle is that a Court of Law would treat as assets every item of property come to the hands of the executor or administrator which he has recovered, or had a right to recover, merely *virtute officii*, i.e., being an executor, which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof(b).

In *Att.-Gen. v. Brunning* (c), a binding contract for sale of real estate had been entered into by a Mr. Hope, the owner of the estate, and the question was as to the liability of the purchase money, on his death, to probate duty. Lord Cranworth(d) said: "I think that Court [the Court of Exchequer] fell into an error in treating this money as being equitable assets. It is a sum which the executor would take as executor

(a) *Chapman v. Eggar*, (1853) 1 Sm. & G. 575; *Bain v. Sadler*, (1871) L. R. 12 Eq. 570.

(b) Per Kindersley, V.C., in *Cook*

v. Gregson, (1856) 3 Drew. 547, 549.

(c) (1860) 8 H. L. C. 243.

(d) At p. 258.

and which, therefore, would be legal assets in his hands. His right would not depend on anything contained in the Will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate; and what an administrator is entitled to recover as administrator, *virtute officii*, can never be equitable assets. In considering whether assets are legal or equitable, the question is not whether the money is recoverable through the agency of a Court of Equity or the agency of a Court of Law, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator. The portions of younger children charged on the family estate are generally only recoverable in equity, but they are certainly legal, not equitable assets. So, money due to a mortgagee in fee, when the mortgagee is not a creditor by covenant or otherwise, and where, therefore, there is no legal remedy." The Court decided that the assets, whether legal or equitable, if recoverable by virtue of the probate, were liable to probate duty.

Portion of deceased younger child.

Money due to mortgagee in fee.

So an equity of redemption of a chattel interest, whether real or personal, is legal assets, since by virtue of his office the personal representative of the mortgagor is entitled to come to Court to redeem (e).

Equity of redemption of chattel interest.

On the same principle a reversionary interest in a settled fund of personalty when it falls into possession and is received by the executor or administrator is distributable as legal assets (f).

Reversionary interest in settled fund.

But if lands were devised to executors to be sold, or devised to be sold by executors, for payment of debts and legacies, the proceeds would be equitable assets (g).

What are equitable assets?

Land devised to be sold, for payment of debts.

Real estate not charged with payment of debts is by 3 & 4 Will. IV. c. 104 made assets to be administered in Courts of Equity. But the Act gives no lien or charge on such real estate until a judgment for administration has been obtained (h).

Real estate made assets under 3 & 4 Will. IV. c. 104.

(e) *Cook v. Gregson*, *ubi sup.*

(f) *Mutlow v. Mutlow*, (1859) 4 De G. & J. 539.

(g) *Att.-Gen. v. Brunning*, *ubi sup.*,

per *Ld. Wensleydale* at p. 263; *Bain v. Sadler*, (1871) L. R. 12 Eq. 570.

(h) *Re Moon*, [1907] 2 Ch. 304.

ASSETS.

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Legal
priority
administered
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of the
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entor

547,

Property
appointed by
Will under
a general
power.

Separate
property of
a deceased
married
woman.

Property appointed by Will under a general power is equitable assets of the testator, the donee of the power (*i*). The question whether such property passes to the executor "as such" within the meaning of the Finance Act, 1894, as to which there is so much judicial conflict (*k*), does not seem to affect the well-settled rule that it is equitable assets.

With regard to the separate property of a married woman, prior to and independently of the Married Women's Property Act, 1882, being a creature of equity, it follows that if she had a power to deal with it, she had the other power incident to property in general; namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors had not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities but by laying hold of the separate property, as the only means by which they can be satisfied (*l*). In this sense property to which a married woman was entitled for her separate use is treated as equitable assets and out of which the executor of the married woman has no right to retain in full his own debt as against other creditors (*m*). More accurately it is an instance of equitable doctrines being applied to an equitable claim (*n*).

(*i*) *Pardoe v. Bingham*, (1868) L. R. 6 Eq. 485; *Re Fearnside*, [1903] 1 Ch. 250, 256, per Swinfen Eady, J.; *Commissioners of Stamp Duties v. Stephen*, [1904] A. C. 137, 140, per Lord Lindley.

(*k*) *Ante*, p. 311.

(*l*) Per Ld. Cottenham in *Owens v. Dickenson*, (1840) Cr. & Ph. 48, 54.

(*m*) *Re Poole's Estate*, (1877) 6 C. D. 739.

(*n*) Cf. *Harrison v. Kirk*, [1904] A. C. 1, 7.

CHAPTER XXVII.

OF PAYMENTS WITHOUT AND WITH NOTICE OF CLAIMS AND RIGHT OF CREDITORS TO FOLLOW ASSETS.

SECT. 1.—*Payments without and with Notice of Claims.*

AN executor or administrator who pays creditors without notice of the existence of a creditor of higher degree is not liable to account for the sums so paid at the instance of that creditor (a).

Payments without notice of debt of higher degree.

Inasmuch as an executor or administrator under the plea of *plene administravit* can put in evidence retainer by him of his own debt, so if *bonâ fide* and without undue haste he has distributed the assets and has fully administered, he is entitled to retain a debt due to himself against creditors of a higher degree of which he had no notice when he distributed the assets (b).

Retainer without notice.

Prior to the statutes requiring registration of judgments executors and administrators had at their peril to take cognizance of debts of record on the principle that every one is presumed to have cognizance of the proceedings in the King's Courts (c). The effect of s. 3 of 23 & 24 Vict. c. 36 was that a judgment not docketed was to be considered only as a simple contract debt. But this Act is repealed by s. 5 of 63 & 64 Vict. c. 26, and it may be contended that the old rule is now revived (d).

Query as to debts of record.

It has already been stated that contingent debts cannot stand in the way of payment of debts of inferior degree (e).

Contingent debts.

Moreover it is not the practice of the Court to retain funds

Practice of the Court.

(a) *Harman v. Harman*, (1685) Show. (3rd ed.) 643.

(b) *Re Fludyer*, [1898] 3 Ch. 562.

(c) *Williams* (10th ed.) 781. Having regard to the doctrine of *lis pendens* it may be questioned whether there is

any presumption as to pending proceedings, see *Wigram v. Buckley*, [1894] 3 Ch. 483.

(d) See *ante*, p. 322.

(e) *Ante*, p. 328.

in Court for the protection of a contingent future creditor, and it is unnecessary to do so for the protection of the executors, for they are sufficiently protected by the order of the Court in the administration of an estate. Consequently the Court will order distribution among the residuary legatees notwithstanding the possible future liability on shares in a limited company, and, since the company has not any right which is enforceable either at law or in equity until a call has been made, it has no *locus standi* to interfere to prevent the distribution (*f*).

Covenants
under leases.

So also it has been held with regard to the liability under leases the covenantee has no equity to apply to have a fund set apart for his indemnity (*g*). For a long time it was the practice of the Court, where the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach (*h*); but it would seem that the authorities only show that it is necessary to set apart a fund for the indemnity of the personal representative when there is privity of estate between him and the lessor; and except in such a case a fund ought not to be retained to the detriment of the beneficiaries (*i*).

Without
order of
Court legacies
cannot be paid
with notice
of possible
liability.

Except under
s. 27 of
22 & 23 Vict.
c. 35, on sale
of leaseholds,

But except under an order of the Court an executor or administrator cannot safely make payment of legacies with notice of even a possible liability, such as a contingent liability in respect of shares retained unsold (*k*).

However, by virtue of s. 27 of 22 & 23 Vict. c. 35 (Lord St. Leonard's Act), where an executor or administrator has sold leaseholds and shall have satisfied all such liabilities under the lease or agreement for a lease as may have accrued due, and been claimed, up to the time of the assignment, and shall have set apart a sufficient fund to answer any future claim that

(*f*) *Re King*, [1907] 1 Ch. 72.

(*g*) *King v. Malcott*, (1852) 9 Hare, 692.

(*h*) *Dodson v. Sammell*, (1861) 1 Dr. & S. 577; and see *Hardy v.*

Fothergill, (1888) 18 App. Cas. 351, 370.

(*i*) *Re Nixon*, [1904] 1 Ch. 638.

(*k*) *Taylor v. Taylor*, (1870) L. R. 10 Eq. 477; *Re Bewley's Estate*, (1871) 24 L. T. 177.

may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, he may distribute the residuary personal estate of the deceased without appropriating any part or further part (as the case may be) to meet any further liability, and shall not be personally liable in respect of any subsequent claim under the lease or agreement for a lease, but without prejudice to the right of the lessor or those claiming under him to follow the assets.

By s. 28 similar provisions are made as to the liability of an executor or administrator to the rent, covenants or agreements contained in any conveyance on chief rent, or rent-charge, or agreement for such conveyance.

and under s. 28 in respect of conveyance on chief rent or rent-charge.

It would seem that the mere circumstance of want of notice of a debt or claim will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that in ignorance of the existence of the debt or claim he has *bonâ fide* handed over the assets to legatees or parties entitled in distribution, and before the Act next mentioned, no executor or administrator could safely distribute the assets except under the direction of the Court (*l*).

Necessity to advertise for claims before distributing.

However, s. 29 of 22 & 28 Vict. c. 35 provides that:—

“Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator

(*l*) Williams (10th ed.) 1082; and (1866) L. R. 3 Eq. 368, 371. per Malins, V.C., in *Clegg v. Rowland*,

Right of
creditors to
follow assets
not pre-
judiced.

Act no pro-
tection
against claims
of which
representative
has notice.

What suf-
ficient ad-
vertisement.

Rules as to
claims in
administra-
tion actions.

has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively."

In order, however, to protect an executor or administrator it is essential that he should have no notice of any claim which, at the time of the distribution of the assets, is left unsatisfied (*m*).

In determining whether executors have given such notices as are sufficient to entitle them to the protection of s. 29, the Court will have regard to the circumstances of the particular case, such as the place of residence of the deceased and his position in life. For instance, where the deceased was a farmer in a small way the insertion of the advertisement in the local newspapers and in the *London Gazette* was held to be amply sufficient. It would seem that according to the practice there must be an advertisement in the *London Gazette*, and as to whether there should be other advertisements in other London papers, that must be decided by the circumstances of the case. In the absence of any special circumstances the period of a month from the date of the notice for the bringing in of claims is sufficient (*n*).

Where the estate is being administered by the Court the following rules apply:—

Ord. 55, r. 44, provides that "where a judgment or order is given or made, whether in Court or in Chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next-of-kin, or other unascertained persons unless otherwise ordered, all persons who do not come in and prove their claims within the time, which may be fixed for that purpose by

(*m*) Per Baggallay, L.J., in *Hunter v. Young*, (1879) 4 Ex. Div. 256, 263.

(*n*) *Re Bracken*, (1889) 43 C. D. 1;

Ord. 55, rr. 44—61 deal with advertisements for creditors and claimants in administration actions.

advertisement, shall be excluded from the benefit of the judgment or order."

And rule 57 provides that "after the time fixed by the advertisement no claims shall be received (except as hereinbefore provided in case of an adjournment), unless the judge at Chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit."

Where, however, there are general assets in Court applicable to the payment of a creditor's debt, such creditor with a legal right of action, according to the well established practice, is allowed to come in and share in those assets which still remain, subject to terms, notwithstanding the appointed time for coming in has long elapsed, and he can only be precluded by showing that he has in some way either released or abandoned his claim (o).

When creditor may come in after time elapsed for receiving claims.

The same rule applies in the administration of an insolvent estate, where s. 10 of the Judicature Act, 1875, applies. The creditor may come in and prove at any time if there are assets undistributed, and if no injustice would be caused (p).

SECT 2.—*The right of Creditors to follow Assets after Distribution.*

There is a distinction between the case where there is still remaining in Court a residue or a fund legally applicable to the payment of debts and the case where the whole estate has been distributed, and it is necessary, in order to obtain payment, for the creditor to get back from the legatees or others, who have been paid, the money which has been paid to them. In the first case the creditor is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees; he has no legal right against the residuary legatees; his only legal right is against the executor. But the Court of Chancery, in order

Distinction between creditor asserting legal right to be paid and equitable right to follow assets in hands of legatees.

(o) *Harrison v. Kirk*, [1904] A. C. 1. (p) *Re McMurdo*, [1902] 2 Ch. 684.

to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of Court or in Court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next-of-kin who derive title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim (q).

In *Ridgway v. Newstead* (r) there was a fund in Court, but it was insufficient for the payment of the creditors who desired to prove, and there were also sums standing to the credit of infant legatees. Stuart, V.-C., admitted without question, the right of the creditor to come in and take the benefit of the decree and prove as regards the residuary estate which still remained undistributed; but as regards the right which he claimed to obtain payment out of sums which had been carried to the credit and appropriated for the payment of the legacies of certain infant legatees, he disallowed the claim on the ground that there was an equitable defence of laches or acquiescence or conduct of that kind.

In actions by creditors against legatees where the legal personal representatives are no longer liable, they ought not *quâ* legal personal representatives to be made parties to the proceedings. An executor who has retained any legacies as trustee, after appropriating them for the benefit of the *cestui que trust* is no longer under any liability *quâ* executor, although he may be liable, and may be a necessary party in his character as trustee (s).

Where, after the estate has been administered and distributed by the Court, a creditor comes in and claims to prove against a fund carried to a separate account to answer a legacy or share of residue, he will not be entitled out of that fund to

Legal personal representatives should not be made party to proceedings by creditors against legatees.

Right of creditor against fund carried to separate account to answer legacy or share of residue.

(q) Per Ld. Davey in *Harrison v. Kirk*, [1904] A. C. 1, 7.

(r) (1860) 2 Giff. 492, affirmed 3 De G. & J. 474; referred to with approval in *Harrison v. Kirk*, *ubi sup.*

As to what may amount to laches see *Mohan v. Broughton*, [1899] P. 211.

(s) *Clegg v. Rowland*, (1866) L. R. 3 Eq. 368, applied by C. A. in *Hunter v. Young*, (1879) 4 Ex. Div. 256.

the whole of the debt, but only a part of it, bearing the same proportion to the whole as the fund in Court, if a legacy, bore to the whole amount of the legacies, or, if a share of residue, to the whole amount distributed (t).

In *Davies v. Nicholson* (u), where an estate had been administered by an executor out of Court, and he had assented to the specifically bequeathed property, and had allowed the residuary legatees to take possession of the rest of the property, it was contended, on the authority of *Gillespie v. Alexander* and *Greig v. Somerville* (x), that a specific legatee was only liable to contribution, and that there could not be any decree against him if the personal estate, not specifically bequeathed, come to the hands of the executor had been sufficient to pay the debts; but it was held that those cases did not apply, for the Court there had distributed the assets, and the creditors could not impugn what had been done except by coming to the Court and submitting to such equitable terms as the Court might think fit to impose, and that there is a distinction where the Court has only to deal with the legal rights of the creditors, and consequently the property specifically bequeathed was not discharged from its liability.

Distinction where estate was distributed out of Court.

Where an undischarged bankrupt died, leaving property acquired after the bankruptcy, and his administrator, without notice of the bankruptcy, distributed the property among the bankrupt's next-of-kin before the trustee in bankruptcy intervened, it was held that the administrator was protected by the administration bond from personal liability, but that the next-of-kin must refund to the trustee the shares they had respectively received (y).

Although the right of mortgagees of real estate, whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and the Court will not enforce it if there are circumstances which would

Legal right, not statute barred, can be enforced against all the assets so long as property remains in hands of a volunteer claiming under the deceased.

(t) *Gillespie v. Alexander*, (1826) 3 Russ. 130; *Greig v. Somerville*, (1830) 1 Russ. & My. 338.

(u) (1858) 2 De G. & J. 693.

(x) *Ubi sup.*

(y) *Re Bennett*, [1907] 1 K. B. 149.

make it inequitable to do so (z), yet the right of an unsatisfied mortgagee to come against other real estate specifically devised or descended, and not included in his security, either under a covenant in which the heirs are bound or as being assets under 8 & 4 Will. IV. c. 104, is a legal right, and can be enforced so long as the debt is not statute barred and the property remains in the hands of volunteers claiming under the testator or intestate (a). But the Court will not allow the creditor to follow the assets into the hands of a *bonâ fide* assignee for value; so that if the specific devisee, whether legal or equitable owner, and whether of the whole estate of the testator or of a particular estate or interest in the land devised, has sold or mortgaged the property devised to him, it cannot be reached in the hands of the purchaser or mortgagee (b).

So also assets of a testator, settled *bonâ fide* on the marriage of the residuary legatee, are no longer liable to the claims of creditors of the testator, although they might have been reached if they had passed into the hands of a volunteer (c).

(s) *Blake v. Gale*, (1886) 32 C. D. 571.

(a) *Re Lacey*, [1907] 1 Ch. 330, and see *post*, p. 398.

(b) *Coope v. Crosswell*, (1866) L. R. 2 Ch. 112, 123, per Ld. Chelmsford: That case was decided with regard to 3 Will. & M. c. 14, which is re-enacted by 1 Will. 4. c. 47, and it has been held that the operation of

the statute 3 & 4 Will. 4. c. 104 is the same; see *British Mutual Investment Co. v. Smart*, (1875) L. R. 10 Ch. 567; *Re Hedgely*, (1896) 34 C. D. 379; *Price v. Price*, (1887) 35 C. D. 297, 305; *Re Atkinson*, (1908) W. N. 129.

(c) *Dilkes v. Broadmead*, (1860) 2 Giff. 113; and see *Graham v. Drummond*, [1896] 1 Ch. 968.

CANADIAN NOTES.

Where one of the next of kin who, if alive, would have been entitled to a distributive share of the estate, had left Canada thirty years before the death of the testator, and after subsequent diligent inquiry his whereabouts were unknown, and no one had heard of his marrying, and no claim was made on his behalf upon the estate, it was held that an advertisement headed "Notice to Creditors," and published at a place in Ontario where the intestate was residing at the time of his death, and given pursuant to R.S.O. 1897, c. 129, calling upon "all creditors and others having claims against the estate" of the deceased to send them in to the solicitor of the administrators by a named date, was sufficient; that it covered next of kin, and that the absentee would be barred if he were hereafter to make any claim, and therefore the administrators should divide the assets amongst those entitled as though the absentee were assuredly dead, without ever having had issue. *Re Ashman* (1907), 15 O.L.R. 42.

Notice
sufficient.

Where a person who if he survived the testator would have been a beneficiary under his will, had not been heard of for more than seven years before the death of the testator, and letters of administration to his estate had been granted upon the presumption that he was dead, although there was no evidence that he was in fact dead, it was held that the onus of proof that he survived the testator lay upon those who claimed under him, and, there being no evidence that he survived, the administrator of his estate failed to establish any right to share in the testator's estate. Distribution among the other legatees or their representatives was ordered, subject to their undertaking to refund should it be established at some future time that the absentee or his representative was entitled. *Re McNiel* (1906), 12 O.L.R. 208.

Onus of
proof of
survival.

Refunding.

In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Uffner v. Lewis* (1899), 27 A.R. 242.

An administratrix published the statutory notice for creditors to file claims and, after the expiry of the time therein stated, paid a large claim in full. Afterwards further claims against the estate were brought to her notice, shewing that the estate was insolvent, and she brought an action against the creditors she had paid in full to recover a portion of the money back as an overpayment. It was held that she had no *locus standi* to maintain the action. *Leitch v. Molson's Bank* (1896), 27 O.R. 621.

See also notes to Ch. XXIII.

CHAPTER XXVIII.

OF THE EFFECT OF DECREES FOR ADMINISTRATION.

A DECREE for administration of assets is in the nature of a judgment for all creditors, and may be pleaded at law to an action by a creditor and stops all proceedings after notice of the decree (a).

Decree for administration in the nature of a judgment for all creditors.

A creditor, however, who has obtained judgment against the executor before the administration order, will not be restrained from pursuing his remedy against the executor personally (b).

The order, once made, enures for the benefit of all creditors, even though the plaintiff may ultimately fail to establish any debt (c).

After judgment, the plaintiff in a creditor's administration action is precluded from discontinuing the action, since, if it is a proper judgment, it not only directs inquiries as to debts, etc., but also that the assets shall be applied "in a due course of administration." If there is not that direction as to the administration of assets, the decree is not an administration decree in the proper sense of the term, and actions at law cannot be restrained. But if that direction is given, they can be restrained, and for the reason that the Court has then taken upon itself the duty of administering the assets. Therefore, in a case like that, until there is a certificate that all the other debts have been paid, the plaintiff after decree is not *dominus litis*; he is, so to speak, a trustee of the action for the benefit of the other creditors (d).

After decree plaintiff is no longer *dominus litis* and cannot discontinue.

It is, however, a fallacy to suppose that because the debt has to be proved, or the payment of the debt has to be

Decree merely affects the remedy.

(a) *Paxton v. Douglas*, (1803) 8 Ves. 520.

(b) *Re Womersley*, (1885) 29 C. D. 567.

(c) *Re Ross*, [1907] 1 Ch. 482, 485.

(d) Per Kekewich, J., in *Re Alpha Co. Ltd.*, [1903] 1 Ch. 203, 205.

enforced through the medium of the Court of Chancery, it becomes an equitable demand and ceases to be a legal demand. Its character is not altered: the only difference made is in the remedy by which the debt can be recovered (*e*).

Payments to
creditors by
personal
representa-
tive after
decree not
allowed.

An executor or administrator will not be allowed payments to creditors made after a decree for administering the debtor's estate (*f*), and if he pays a creditor he does it at his own risk and is only entitled to stand in the place of the creditor against the estate (*g*).

Before judg-
ment he may
prefer.

But before judgment he may voluntarily pay a creditor in full, and will be allowed it in passing his accounts, even though he may have had notice of the commencement of a creditor's administration action (*h*).

Before judg-
ment Court
will not inter-
fere with
legal right
to prefer.

There is no equity which entitles the Court to interfere by the appointment of a receiver before judgment for administration in order to interfere with the legal right of the executor or administrator to prefer one creditor to another. To obtain the appointment of a receiver a special case must be made of assets being wasted (*i*).

Difference
between right
to prefer and
right to retain
after judg-
ment.

The right of the executor or administrator to prefer one creditor, and the right to retain his own debt, are in many respects the same thing in substance and principle; though no doubt the latter can, while the former cannot, be exercised after an administration decree (*j*).

Effect of
order for an
account.

An order in an administration action under Ord. XV., r. 1, merely for an account, and reserving further consideration, does not affect the right of creditors to sue, or the right to prefer creditors (*k*), or the legal priorities of creditors (*l*).

Personal
representa-
tive not
bound to
plead Statute
of Limita-
tions.

In the administration of assets in a creditor's suit, the

(*e*) *Harrison v. Kirk*, [1904] A. C. 1, 5, per *Ld. Davey*.
(*f*) *Mitchelson v. Piper*, (1836) 8 Sim. 64.
(*g*) *Irby v. Irby*, (1857) 24 Beav. 525.
(*h*) *Re Radcliffe*, (1878) 7 C. D. 733; *Vibart v. Coles*, (1890) 24 Q. B. D. 364.
(*i*) *Phillips v. Jones*, (1884) 28 Sol. J., 360; *Harris v. Harris*, (1887) 35 W. R. 710; *Re Wells*, (1890) 45 C. D. 569.
(*j*) Per *North, J.*, in *Re Hervey*, [1899] 1 Ch. 514; and see *Nunn v. Barlow*, (1824) 1 S. & S. 588.
(*k*) *Re Barrett*, (1889) 43 C. D. 70.
(*l*) *Nunn v. Barlow*, *ubi sup.*

personal representative is not bound to plead the Statute of Limitations; and if any person comes in and takes the benefit of a decree obtained by a creditor, whose claim would have been barred by the statute, he shall not be at liberty to set up the statute against the plaintiff, whose claim is the foundation of the decree; but he may set up the statute as against any person other than the plaintiff, although the personal representative does not bring forward the objection (*m*).

When Statute may be set up against plaintiff's debt.

Where there is a contest the plaintiff has only to prove his debt once for all at the hearing, and in that case, if the statute has not then been successfully set up by the personal representative, he cannot set it up afterwards (*n*). But in a suit by one or more creditors on behalf of all, as every creditor has a right to question the claim of every other, because it may interfere with his own, and as all are not before the Court at the hearing, the plaintiff is called upon to prove his debt over again before the Master (*o*); yet, as already stated, if the personal representative will not set up the statute, it cannot be set up by any other creditor who comes in under the decree (*p*).

In a creditor's suit for administration, where the defendant, who was both executor and devisee in trust, had not set up the Statute of Limitations, it was held that as to the personal estate the residuary legatees could not set it up against the plaintiff; but that as to the real estate, inasmuch as formerly the *cestuis que trustent* of devised estates would have been necessary parties to the suit instituted by the plaintiff, and might have set up the statute, they ought not to be put in a worse position in consequence of the Court and the Legislature having, for the purpose of saving expense, dispensed with their being parties (*q*).

Distinction where creditor plaintiff claims to be paid out of real estate.

(*m*) Fuller v. Redman, (1859) 26 Beav. 614.

(*n*) Adams v. Waller, (1866) 14 L. T. 727.

(*o*) Owens v. Dickenson, (1840) Cr. & Ph. 48; referred to in Adams v. Waller, *ubi sup*.

(*p*) Fuller v. Redman, *ubi sup*.

(*q*) Briggs v. Wilson, (1853) 5 De G.

M. & G. 12, followed in *Re Lacey*, (1906) W. N. 213. It is, however, submitted that, having regard to the former practice stated in Mitford on Pleadings (5th ed.), pp. 202, 203, and the express enactment of s. 42 (9) of 15 & 16 Vict. c. 86 (1852), Briggs v. Wilson on this point, so far as relates to devised estates, may be questioned.

In *Hunter v. Baxter* (r) it was held, in an action for the administration of real and personal estate, that where a judgment has been recovered against executors for a debt due from their testator, and they paid the debt, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up by them against the creditor who recovered the judgment.

Effect of s. 10
of Judicature
Act, 1875.

The effect of s. 10 of the Judicature Act, 1875, where an insolvent estate is being administered under an order of the Court has already been considered (s), as well as the practice of the Court as to the distribution of assets notwithstanding contingent claims and the protection afforded to the personal representative by the order (t); also the right of creditors to follow the assets (u).

(r) (1861) 3 Giff. 214.

(s) *Ante*, p. 329

(t) *Ante*, pp. 347, 348.

(u) *Ante*, p. 351.

CHAPTER XXIX.

OF LIABILITIES FOR WHICH THE PERSONAL REPRESENTATIVE MAY BE SUED.

SECT. 1.—*Liability for the Acts of the Deceased.*

(1) *On Obligations Ex Contractu.*

STAT. 3 & 4 Will. IV. c. 42, s. 14, first gave an action for debt on simple contract against an executor or administrator; prior thereto it was customary to bring an action upon the case upon the defendant's implied promise (a).

Action for debt.

An action for account at law was first given against an executor or administrator by stat. 4 & 5 Ann. c. 16, s. 27 (b).

Action for account.

The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator (c).

Claims arising from contract or other duty survive.

It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position then on assumpsit the executor might still be held liable (d).

Obligation may be implied.

Instances of implied obligation, in consequence of the position which the parties have undertaken one to another, are the obligations of carriers and bailees; the obligation of the buyer of shares in a public company liable to calls to indemnify the seller from all liability in respect of them; the

Instances of implied obligation: carrier and bailee; buyer and seller of shares;

(a) See Williams (10th ed.) 1566.

see *ante*, p. 264.

(b) *Ibid.*

(c) Williams (10th ed.) 1346; and

(d) Per Cotton, L.J., in *Batthyany v. Walford*, (1887) 36 C. D. 269, 279.

dilapidations
of deceased
rector or
vicar;
copyhold
tenant;
devisee sub-
ject to direc-
tion to repair;
negligence of
deceased
solicitor.
Contracts
personal to
deceased.

position of the rector or vicar which renders his personal representative after his death liable to be sued for dilapidations (e); or of the copyhold tenant who accepts his tenancy upon the terms that he shall keep the premises in repair (f); or of the devisee who accepts the devise subject to a direction in the Will to keep the premises in repair (g); or of the solicitor whose executor is liable for negligence by the deceased in the conduct of his client's affairs (h).

No liability, however, attaches upon the executor or administrator where the contract is personal to the deceased and ceased on his death, unless the breach occurred in his lifetime (i).

On breach of
promise of
marriage
special
damage to
property must
be proved.

An action for breach of promise of marriage will not lie against personal representatives of a deceased promisor except for special damage to the property, and not to the person, of the promisee, and within the contemplation of both parties at the date of the promise (k).

Liability of
personal re-
presentative
of deceased
master under
apprentice-
ship deed.

Although on the death of a master, in the absence of special agreement, no action will lie by an apprentice or pupil for the recovery of any part of the premium paid under the indenture of apprenticeship, yet where the indenture contains a covenant for maintenance, the personal representative of the master is liable on the covenant as far as he has assets; and by the custom of London he is bound to put the apprentice to another master of the same trade (l).

Liability
on covenants
running with
the land:
where the
deceased was
the cove-
nantor;

With regard to the liability of the personal representative of a deceased person in respect of covenants which run with the land, where the deceased person was the covenantor, the personal representative is liable for any breach to the extent of the assets, although the deceased had parted with possession, since the privity of contract is not determined by the

(e) Per Cotton, L.J., in *Bathby v. Walford*, (1887) 36 C. D. 269, 279; and see *post*, p. 380.

(f) *Blackmore v. White*, [1899] 1 Q. B. 293; and see *post*, p. 380.

(g) *Re Williams*, (1886) 54 L. T. 105; and see *post*, p. 379.

(h) *Wilson v. Tucker*, (1822) 3 Stark.

154; *Blyth v. Fladgate*, [1891] 1 Ch 337, 366.

(i) *Farrow v. Wilson*, (1869) L. R. 4 C. P. 744; and see *ante*, p. 264.

(k) *Chamberlain v. Williamson*, (1814) 2 M. & S. 406; *Finlay v. Chirney*, (1888) 20 Q. B. D. 494.

(l) *Williams* (10th ed.) 1402.

death of the covenantor or by assignment (m). But in respect of leasehold property and covenants in conveyances, the personal representative is entitled after assignment to a purchaser to the protection given by ss. 27 and 28 of 22 & 23 Vict. c. 35 (n).

Where the deceased person was not the covenantor, but only assignee of the estate, if the covenant does not run with the land, but is in the category of collateral covenants, the deceased or his personal representative is not liable under it; but if it is a covenant which runs with the land, the deceased or his personal representative is liable for breaches only during the continuance of his ownership or, in other words the privity of estate (o).

In the case of burdensome leaseholds which the deceased person acquired by assignment, if the lessor refuses to accept a surrender it is the duty of the personal representative, if possible, to assign to a pauper to relieve the estate from further liability, but not to deprive the landlord of his legal remedies for rent due or breaches of covenant incurred previous to the assignment (p).

With regard to arrears of rent accrued in the lifetime of the testator or intestate, the action to recover them must be brought against the personal representative in his representative character; and the judgment will be *de bonis testatoris* (q).

But in an action of debt for rent accrued after the death of the lessee, if the personal representative enters upon the demised premises, the lessor has his election, either to sue

where the
covenant was
made, but
only assignee

Duty of per-
sonal repre-
sentative
where
deceased was
assignee of
burdensome
leaseholds.

Liability
for rent
accrued in
lifetime of
deceased;

for rent
accrued after
death.

(m) Williams (10th ed.) 1384; Page v. Midland Railway Co., [1894] 1 Ch. 11.

(n) See *ante*, p. 348. As to the form of covenant of indemnity a vendor selling subject to restrictive covenants may require from the purchaser, see *Re Poole and Clarke's Contract*, [1904] 2 Ch. 178; and as to the form of covenants on a decree against personal representatives for specific performance of a contract to take a lease, see *post*, p. 362.

(o) See *Spencer's Case*, (1582) 5 Rep. 16, and notes in *Smith's Leading Cases* (11th ed.) p. 55; also *Dewar v. Goodman*, [1907] 1 K. B. 612; [1908] 1 K. B. 94; and *ante*, p. 271. As to what amounts to a breach of covenant for quiet enjoyment, see *Williams v. Gabriel*, [1906] 1 K. B. 155.

(p) *Onslow v. Corrie*, (1817) 2 Madd. 330; *Rowley v. Adams*, (1839) 4 My. & Cr. 534.

(q) Williams (10th ed.) 1388.

him as executor or to charge him personally as assignee in respect of the perception of the profits (r).

So long as the assets hold out the personal representative must pay the rent and cannot waive the possession (s).

How personal representative may limit his liability to rent.

If the personal representative is sued in his representative character, by a proper plea, he will only be liable to the extent of the assets; but if he is sued as assign of the lease for the rent accrued during the time he was in possession, and the estate is insolvent, he is entitled to set up by way of defence that he is only assign as executor or administrator, and that the profits or yearly value of the property amount only to a sum less than the rent, and on payment into Court of what he admits to be the value, if his plea is proved, and that is the full value, he will be under no further liability. The liability for the rent reserved is to the extent to which he might by the exercise of reasonable diligence have derived profit or advantage from the premises (t): that is, he is liable in respect of the period during which he is in possession for the same sum as a trespasser for the same period would be liable for as mesne profits (u).

But it would seem that a personal representative who takes possession can only limit his liability in respect of rent, and not in respect of breach of contract to repair (x).

Cannot limit liability for breach of covenant to repair.

Form of covenants when ordered to accept a lease.

Where specific performance of a contract to take a lease, entered into by a person since deceased, is ordered against his personal representatives, the covenants must be so framed that no personal liability shall be incurred by them (y).

Liability of personal representative of deceased shareholder.

The liability of the personal representatives of a deceased shareholder for moneys payable on shares in a public company registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), is regulated by ss. 16, 75, 76, 99, and 105 of that Act.

Except in the event of a company being wound up the

(r) Williams (10th ed.) 1358.

(s) *Ibid.*, 1393.

(t) *Re Bowes*, (1887) 37 C. D. 128; *Rendall v. Andrew*, (1892) 61 L. J. Q. B. 630.

(u) *Whitehead v. Palmer*, [1908] 1

K. B. 151, 158.

(x) Williams (10th ed.) 1394; *Rendall v. Andrew*, *ubi sup.*

(y) *Stephens v. Hotham*, (1855) 1 K. & J. 571.

liability is not a debt until a call is made (*z*). But, as already mentioned (*a*), the personal representative, if he distribute the estate among the beneficiaries with notice of the contingent liability, remains liable to the company in respect of the shares retained unsold to the extent of the assets so distributed (*b*), unless the distribution is made under the order of the Court (*c*): but in the case of distribution without such an order, he will be entitled to indemnity out of the deceased's estate for what he may be called upon to pay, and to recover back the assets from the beneficiary (*d*).

Under s. 105 of the Act of 1862, if the personal representative of a deceased contributory makes default in payment of any sum ordered to be paid by him, proceedings may be taken for administration of such deceased contributory's estate, and compelling payment thereof of the moneys due.

The personal representative of a deceased shareholder in a company registered under the Act of 1862 may either have the shares transferred into his own name and become to all intents and purposes a member of the company, or will be allowed a reasonable time to sell the shares and produce a purchaser who will take a transfer of them. Simply notifying to the company that he is executor or administrator is not sufficient authority to the company to put his name upon the register in such a way as to make him personally liable (*e*). The executor or administrator is, however, entitled, if he thinks fit, to have his name entered upon the register without any reference to his representative capacity (*f*).

With regard to shares of railway and other companies subject to the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), the personal representative may either leave the shares alone, outstanding in the name of the deceased shareholder, the consequence being he could neither transfer the shares, nor vote

Position of representative of deceased shareholder as to being registered as member of the company: under the Companies Act, 1862;

under the Companies Clauses Act, 1845.

(*z*) *Whittaker v. Kershaw*, (1890) 45 C. D. 320.

(*a*) *Ante*, p. 348.

(*b*) *Taylor v. Taylor*, (1870) L. R. 10 Eq. 477.

(*c*) *Re King*, [1907] 1 Ch. 72.

(*d*) *Jervis v. Wolferstan*, (1874) L. R. 18 Eq. 18.

(*e*) *Buchan's Case*, (1879) 4 App. Cas. 549.

(*f*) *Re T. H. Saunders & Co., Ltd.* [1908] 1 Ch. 415.

in respect of them, nor receive dividends on them, and would only be liable to calls in his representative capacity; or, if he wants to deal with the shares, or to receive the dividends in respect thereof, he must avail himself of the machinery given by the 18th section of the Act and procure himself to be registered as a shareholder (g).

Position of
joint contrac-
tors.

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (h).

There is in the cases of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement. The cause of action when pursued to a judgment against one of the joint debtors is absorbed and merged in the judgment not only as against him but as against all the rest (i). And where both joint debtors were originally made defendants to and entered appearance in the same action, and judgment by consent is obtained against one of them in the action, such judgment is a bar to further proceedings against the other (k).

Effect of
death of
one of two
joint judg-
ment debtors.
Distinction
between
execution by
fi. fa. and on
elegit.

Where there are two or more defendants joint contractors in a personal action, and one or more of them dies within six years after joint judgment, execution by *fi. fa.* should be against the survivors only, and may be had against the survivors without obtaining leave for that purpose, but the writ must contain a suggestion of the death, so as to account for the omission of the deceased party's name. If the plaintiff wishes to proceed against the realty by *elegit* he must obtain leave to issue execution against the land of the survivor and the land of the deceased, as he cannot proceed as to the realty against the

(g) *Barton v. London and North Western Railway Co.*, (1889) 24 Q. B. D. 77, 88, per Lindley, L.J.

(k) *Williams* (10th ed.) 1367; *White v. Tyndall*, (1888) 13 App. Cas. 263.

(i) *King v. Hoare*, (1844) 13 M. & W. 494; and see *Re Hodgson*, (1885) 31 C. D. 177, 188, per Bowen, L.J.

(*) *McLeod v. Power*, [1898] 2 Ch. 295.

survivor alone. The reason for the distinction is that the judgment survives as to the personalty, but not as to the real estate; since under the Statute of Westminster 2 the execution on *elegit* must be equally made against the lands of all chargeable (l).

Leave to issue execution against the land of the deceased is obtained under Ord. 42, r. 23.

In a joint contract for the benefit of all each takes upon himself the liability to pay the whole debt at the implied request of each of the other co-contractors, and on the implied promise that each will contribute an aliquot part to the contractor who pays the entire debt, and an action for contribution will lie against the legal personal representative of the deceased co-contractor (m).

Right of contribution against representative of deceased joint contractor.

There is a distinction between the right to contribution arising out of a joint contract and the right to contribution against persons becoming entitled as grantees or assignees to property subject to a liability under a contract. Where an incumbrance is a paramount charge, operated with which all the estates originally came to the grantor, the principle of equality applies, and the grantor has the same right against purchasers from himself which they have *inter se*, i.e., to resist the proceeding of the incumbrancer till he brings all in to share the common burthen. But the case of the debtor himself or his heir-at-law in respect of retained lands is an exception to that principle by reason solely of his personal liability, and to such exception it matters not whether the purchasers were such with consideration or without (n). So where a debtor owed a sum of money charged on certain property and made a voluntary assignment to his wife of the property and died, and on his death his executors paid off the debt, it was held that, the charge being one created by the assignor

Distinction between joint contractors and persons entitled to properties subject to an incumbrance.

(l) 2 Saund. 51, n. (4); Notes to Saunders' Rep. (1871), vol. 2, pp. 236, 237; Chitt. Arch. (14th ed.) p. 961.

(m) Herries v. Jamieson, (1794) 5 T. R. 556; Batard v. Hawes, (1853) 2 E. & B. 287, 297; and see Williams

(10th ed.) 1378, 1414; and the observations of Ld. Halsbury in Ruabon Steamship Co. v. London Assurance, [1900] A. C. 6, 9.

(n) Ker v. Ker. (1869) 1r. R. 4 Eq. 15.

himself, and not a charge paramount to his own title, the widow was under no liability to contribute (o).

Contract joint in form, but in substance joint and several :

there must be antecedent separate liability to render representative of deceased liable.

Wherever a Court of Equity sees that in a contract joint in form the real intention of the parties was that it should be joint and several, it will give effect to such intention; as for instance in the case of a joint bond where there has been a credit previously given to the different persons who have entered into the obligation, or where there was a joint and several liability independently of the contract (p). In such cases the Court looks at the substance of the contract in considering the construction of the instrument (q). But where there was no antecedent separate liability, but the obligation exists only by virtue of a joint covenant, the extent of its operation is measured by the words used, and the construction is the same in equity as at law (r).

A joint loan does not create in equity a joint and separate liability (s).

Principle on which partnership or mercantile contracts may be treated several as well as joint.

As to partnership debts and mercantile contracts, instead of holding that the cases establish the principle that all partnership or mercantile contracts are for all purposes several as well as joint, it is more correct to say that relief was originally given in these cases as a consequence, which equity attributed to the rule *jus accrescendi inter mercatores locum non habet*, namely, that as the estate of the deceased, notwithstanding his death, retained an interest in the partnership property, his estate ought not to be protected or relieved by his death from liability in respect of contracts of which it still retained the benefit, and that to this extent partnership contracts were to be considered several; or, in other words, that in partnership contracts, of which the profit does not go exclusively to the survivors, there is in the view of a Court of Equity an implied stipulation that in the event of the death of

(o) *Re Darby's Estate*, [1907] 2 Ch. 465.

(p) See Williams (10th ed.) 1376 *et seq.*

(q) *Beresford v. Browning*, (1875) 1

C. D. 30, 34.

(r) *Levy v. Sale*, (1877) 37 L. T. 709; *White v. Tyndall*, (1888) 13 App. Cas. 463.

(s) *Jones v. Beach*, (1852) 2 De G. M. & G. 886.

any of the contractors his estate shall still remain liable, and that in this way the estate of each partner is in equity severally liable (t). The expression that a partnership debt is in equity joint and several is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts took place in the administration of the assets either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a Court of Law the debts of the survivors; but the survivors, on the other hand, in a Court of Equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right through the surviving partners, to come for payment against the assets of the deceased partner (u).

But a contract which is in terms joint and would be so construed at law is not to be treated in equity as joint and several; and it was accordingly held in *Kendall v. Hamilton* (x) that, on the principle of *King v. Hoare* (y), an action, and a judgment, against two persons who had borrowed money from the plaintiffs (though the judgment was unsatisfied), constituted a bar to another action brought by the same plaintiffs against a third person, who was afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed.

(t) *Kendall v. Hamilton*, (1878) 3 C. P. D. 403, 408, per Cotton, L.J.

(u) *Kendall v. Hamilton*, (1879) 4 App. Cas. 504, 517, per Lord Cairns.

(w) *Ubi sup.*

(y) (1844) 13 M. & W. 404; *ante*, p. 364.

Conditions imposed on creditor enforcing remedy against estate of deceased partner.

Concurrent remedies against surviving partner and estate of deceased partner.
Partnership Act, 1890.

Limited Partnerships Act, 1907.

The Court has imposed two conditions with regard to enforcing the remedies against the estate of a deceased partner. In the first place the partnership debts are postponed to the separate debts of the deceased partner, since partnership debts are paid first out of partnership assets and it is only from what remains that anything can flow to the separate estate of the deceased partner; and in the second place the Courts have required the presence of the surviving partner in some manner at the taking of the accounts of the partnership (z).

The creditor of a partnership firm has concurrent remedies against the estate of the deceased partner and the surviving partner, and it makes no difference which remedy he pursues first (a).

Sect. 9 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), now expressly provides that every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied; but subject in England or Ireland to the prior payment of his separate debts.

By s. 38 (1), subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death of any partner.

By s. 86 (8) the estate of a partner who dies is not liable for partnership debts contracted after the date of the death; and by s. 14 (2), where the partnership is continued in the firm-name, the continued use of that name, or of the deceased partner's name as part thereof, shall not of itself make his executors or administrators, estate or effects, liable for any partnership debts contracted after his death.

By the Limited Partnerships Act, 1907 (b), as to limited partnerships established under that Act, a limited partner, so long as he does not take any part in the management of the partnership business, is not liable for the debts or obligations of the firm beyond the amount contributed by him.

(z) *Re Hodgson*, (1884) 31 C. D. 177, 192, per Fry, L.J.

(a) *Re Hodgson*, *ubi sup.*

(b) 7 Edw. 7, c. 24; see *ante*, p. 203.

As to whether a liability under a guarantee ceases on the death of the guarantor or not is a question of construction of the contract.

Liability of personal representative of deceased guarantor.

There would seem to be two classes of continuing guarantees:—

Two classes of continuing guarantees.

First, where the consideration for the guarantee is given once for all and is entire; as where in consideration of the lessor granting a lease to a third party the guarantor will be answerable for the performance of the covenants, or in consideration of taking an individual into service in a responsible position the guarantor will be answerable for his fidelity as long as he continues in that service—in that case the guarantee does not cease on the death of the guarantor (c).

Secondly, where the consideration is fragmentary, supplied from time to time, and therefore divisible, as where the guarantee is given to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied; unless it is stipulated to the contrary the guarantor may at any time terminate the guarantee (d).

In the latter class of cases the mere fact of death does not determine the guarantee (e), but it would seem that, in the absence of stipulation to the contrary, notice of the death of the guarantor is to be considered to be notice to terminate the guarantee (f). But where the contract provides for a notice of a definite period to be given before terminating the guarantee, mere notice of death only would not be sufficient, but notice determining the liability must be given in accordance with the contract (g), unless the circumstances show that after the death the parties dealt together on the footing that the guarantee was at an end (h).

(c) *Lloyds v. Harper*, (1880) 16 C. D. 290; *Re Crace*, [1902] 1 Ch. 733.

(d) *Coulthart v. Clementson*, (1879) 5 Q. B. D. 42, 46; *Lloyds v. Harper*, *ubi sup.*

(e) *Bradbury v. Morgan*, (1862) 1 H. & C. 249.

(f) *Coulthart v. Clementson*, *ubi sup.*; *Re Whelan*, deceased, [1897] 1 I. R. 575.

(g) *Re Silvester*, [1895] 1 Ch. 573; and see per Joyce, J., in *Re Crace*, *ubi sup.*, at p. 739.

(h) *Harris v. Fawcett*, (1873) L. R. 8 Ch. 866.

Partnership
Act, 1900,
s. 18.

Liability of
personal re-
presentative
of deceased
husband for
wife's ante-
nuptial debts.

Sect. 18 of the Partnership Act, 1890, provides that: "A continuing guaranty or continuing obligation given either to a firm or to a third person in respect of the transaction of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given."

It would seem that to the extent to which a husband at his death is liable for his wife's ante-nuptial debts, to the same extent his personal representative will continue liable in respect of his assets. At common law a husband was liable for his wife's ante-nuptial debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or not. But he could not be sued alone for such debts if his wife was alive, and he could not be sued at all for them after his wife's death (i). As to persons married on or after the 1st January, 1883, s. 14 of the Married Women's Property Act, 1882, provides that a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Act relating to joint stock companies, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise.

The husband's liability cannot be regarded as a joint liability only. The cases therefore of *King v. Hoare* and *Kendall v. Hamilton* (k) have no application to actions against husbands for their wives' ante-nuptial debts. The cause of

(i) Per Lindley, L.J., in *Beck v. Pierce*, (1899) 23 Q. B. D. 316, 320.

(k) See *ante*, pp. 364, 367.

action, however, is the wife's contract, and the Statute of Limitations has always been regarded as beginning to run in the husband's favour, as well as the wife's, from the time when the cause of action accrued against her; and any acknowledgment or part payment by her before marriage kept her debt alive, both as against her and her after taken husband; but similar acts by her after marriage were of no avail, either against herself or as against her husband. Although the Married Women's Property Act, 1882, enables a wife to keep alive her liabilities in respect of her separate estate by making an acknowledgment, or by part payment, or by suffering judgment to be obtained against her, such acts, it would seem, do not affect her husband. On the other hand, similar acts by him will not affect her direct liability to her creditors (l).

The liability of the husband on the wife's contracts for necessities for the household is governed by the general principles of the law of principal and agent. He must have expressly or impliedly authorised her to act as his agent. Where she is living with her husband, and goods ordered or supplied are of such a character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls, the presumption *prima facie* arises of an actual authority, but that presumption may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses on the understanding that she was not to pledge his credit (m).

Liability of personal representative of deceased husband for credit given to wife during cohabitation.

It is immaterial whether the persons dealing with the wife did or did not know that she was a married woman (n). But if the plaintiff gets judgment against the married woman alone, he cannot afterwards get judgment against her husband also. His remedy is alternative, and it cannot be made available against the two (o).

(l) *Beck v. Pierce*, *ubi sup.*

(m) *Morel Brothers & Co. v. Earl of Westmoreland*, [1903] 1 K. B. 64; [1904] A. C. 11; *Paquin, Ltd. v.*

Beauclerk, [1906] A. C. 148.

(n) *Ibid.*

(o) *Morel Brothers v. Earl of Westmoreland*, *ubi sup.*

The authority of the wife is revoked by the death of her husband, and therefore his estate can only be made liable for credit given to his wife during his life.

The same principles apply where a man cohabits with a woman who passes as his wife (*p*).

Evidence in support of claims.

With regard to the evidence in support of claims against the estate of a deceased person, there is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration. If the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon (*q*).

Ne unques executor.

Where the executor or administrator denies the character in which he is sued he must do so specifically (*r*). This was formerly done by pleading *ne unques* executor or administrator (*s*).

Joinder of claims against representative in that capacity with personal claims.

Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*t*).

(2) On Obligations *Ex Delicto*.

At common law.

The rule of the common law was and remains, except so far as altered by the Act 3 & 4 Will. IV. c. 42, that an action for a wrong committed, for which unliquidated damages only could be recovered, cannot be brought against the legal personal representatives of the wrongdoer (*u*).

Effect of 3 & 4 Will. IV. c. 42, s. 2.

The stat. 3 & 4 Will. IV. c. 42, s. 2, enables an action to be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal,

(*p*) *Blades v. Free*, (1829) 9 B. & C. 167.

(*q*) *Re Hodgson*, (1885) 31 C. D. 177; *Re Farman*, (1888) 57 L. J. Ch. 637; *Rawlinson v. Scholes*, (1898) 79 L. T. 350.

(*r*) See Ord. 19, r. 13.

(*s*) See Williams (10th ed.) 1572.

(*t*) Ord. 18, r. 5.

(*u*) *Kirk v. Todd*, (1882) 21 C. D. 484; and for instances of mere tort see Williams (10th ed.) 1352 *et seq.*

so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debt of such person.

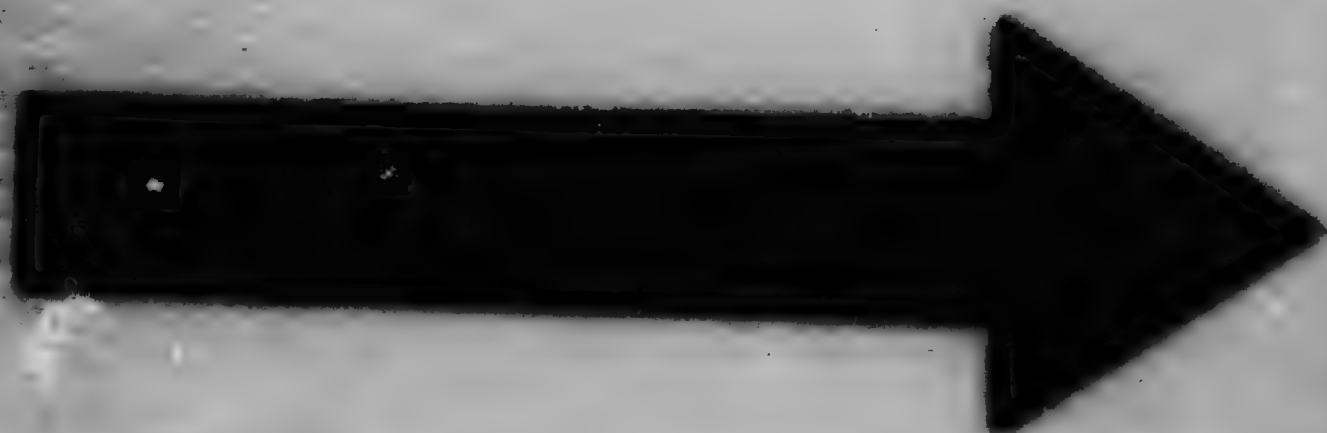
But there may be circumstances under which an action may be maintained for a tortious act against the executors or administrators of the wrongdoer apart from the above statute. The law as to this is stated as follows by Bowen, L.J., in *Phillips v. Homfray* (x), in delivering the judgment of the majority of the Court of Appeal:—

Apart from statute action maintained where in substance to recover property, or its proceeds, or value.

“The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the

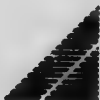
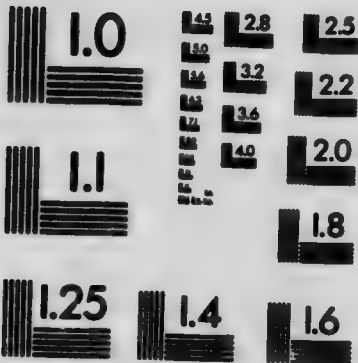
Mere indirect benefit to wrongdoer insufficient to give right of action.

(x) (1883) 24 C. D. 439, 454.



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wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value, of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary (y)—as such, lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognises in this indirect benefit which he may have received any ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits of land, which have wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions that we need not now discuss) may be pursued by the rightful owner, and recovered from the wrongdoer, or, if he is dead, from his estate. But there is a sense in which the term 'profits' is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained, to recover, not the rents or produce of land, or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. An action for mesne profits in this narrower sense will not lie at common law and apart from statute against executors, and no account would be decreed in equity, except in a case where the profits were either

(y) Query, whether an action for voluntary waste would not lie at the suit of the owner in fee of the immediate reversion against the personal representatives of the deceased tenant for life under the statute Marbridge (52 Hen. III.), and of Gloucester (6 Edw. I. c. 5), for waste committed

by the deceased tenant for life, so as the injury and the action is brought within 3 & 4 Will. IV. c. 42, s. 2. See *Woodhouse v. Walker*, (1880) 5 Q. B. D. 404, 407, but the point was left open in *Re Williams*, (1885) 52 L. T. 41, and C. A. 54 L. T. 105, 106.

property or the produce, or profits, or value of property actually received."

In *Phillips v. Homfray* (z) by decree it had been declared that H. and F. and the estate of their deceased partner were liable to the plaintiffs for minerals taken by them under the plaintiffs' farm, and that H. and F. were liable to compensate the plaintiffs for user of all roads and passages under the farm, and inquiries were directed:—(1) As to the quantity of minerals taken and their value. (2) What quantities of minerals had been carried by the defendants through the roads or passages under the farm. (3) What upon the result of the second inquiry ought to be paid by the defendants as wayleave for the user of the roads and passages. (4) Whether the farm and the mineral property of the plaintiffs under it had sustained any and what damage by means of the way in which the defendants had worked under the farm. Pending these inquiries F. died, and his executrix moved to stay proceedings under the second, third, and fourth inquiries. And it was held in accordance with the principles so laid down by Bowen, L.J., that the proceedings under the second, third, and fourth inquiries must be stayed.

On the same principle the case of *Re Duncan* (a) was decided. There the purchaser from a testator of certain worthless shares in a limited liability company, instead of repudiating and claiming rescission of the contract and return of purchase money on the ground of misrepresentation, claimed to be entitled to prove in an administration action for damages for misrepresentation against the testator's estate, and assessed his damages at the price he had paid the testator for the shares, and it was held that the damages were unliquidated and uncertain, and that the executors of the wrongdoer could not be sued merely because his estate might have benefited by the wrong complained of.

So an action for damages for misrepresentation contained in a prospectus is an action for deceit, and cannot be

Action for
deceit will not
lie against
personal re-
presentatives
of wrongdoer.

(z) *Ubi sup.*

(a) [1899] 1 Ch. 387.

maintained against the personal representatives of a deceased director (b).

Nor action for mere negligence against personal representative of deceased director of a company.

Again an action cannot be maintained against the legal personal representatives of a deceased director for negligence as regards any loss beyond money placed in the director's hands (c), and they are not persons who can be made liable under s. 165 of the Companies Act, 1862 (25 & 26 Vict. c. 89), in the winding up of a company (d).

Effect of Directors Liability Act, 1890.

It would seem that under the Directors Liability Act, 1890 (53 & 54 Vict. c. 64) there is a statutory liability to which the maxim "*Actio personalis moritur cum personâ*" does not apply (e).

Inquiry decreed as to damages will abate by death of defendant.

In cases where the maxim applies, even after decree if the defendant dies pending the inquiry as to damages, the proceedings cannot be continued against his personal representatives (f).

Liability of personal representative of deceased husband for tortious acts of wife.

With regard to liability for tort arising out of the relation of husband and wife, since the Married Women's Property Act, 1882, the husband's liability for wrongs committed by his wife before marriage is restricted, as in the case of ante-nuptial debts of his wife, to the extent of property which he shall have acquired or become entitled to from or through his wife, but his joint common law liability still remains for any fraud or other torts committed by her during the coverture, unless it is directly connected with the wife's own contract and is the means of effecting or inducing it and is part of the same transaction. The Act of 1882 does not relieve him from liability for wrongs done by his wife during the coverture (g). The Act gives the option of suing the wife where she has

(b) *Peck v. Gurney*, (1873) L. R. 6 H. L. 377.

(c) *Overend, Gurney & Co. v. Gurney*, (1869) L. R. 4 Ch. 701; affirmed L. R. 5 H. L. 480.

(d) *Re British Guardian Life Assurance Co.*, (1880) 14 C. D. 335.

(e) *Shepherd v. Bray*, [1906] 2 Ch. 235; but on appeal, [1907] 2 Ch. 571, a settlement was arrived at, and the

Court intimated they were not prepared to assent to all that was decided by the Court below.

(f) *Smith v. Eyles*, (1742) 2 Atk. 385; *Phillips v. Homfray*, *ubi sup.*; *Davoren v. Wootton*, [1900] 1 I. R. 273.

(g) *Seroka v. Kattenburg*, (1886) 17 Q. B. D. 177; *Earle v. Kingscote*, [1900] 2 Ch. 585.

separate property, but the husband is not discharged from his old common law liability, and the plaintiff may, therefore, sue the husband and wife jointly or the wife alone for damages. If the old common law action against the husband and wife jointly is adopted by the plaintiff it must be a joint judgment (*h*), and the execution follows the judgment (*i*). It would seem, therefore, that on the death of the wife after judgment, the husband surviving, it could be enforced against him (*k*), and it would follow against his personal representative. But if the wife should die before judgment the action abates (*l*).

The maxim "*Actio personalis moritur cum personâ*" does not apply where the act is not a mere tort, but is a breach of a *quasi* contract, as where the claim is founded on a breach of a fiduciary relation or a failure to perform a duty. In such cases the law implies a contract that a man will faithfully perform the duties which he has undertaken (*m*). Consequently the representatives of a deceased trustee have always been held liable for loss occasioned by the breach of trust of the deceased trustee in his lifetime, whether he derived benefit from the breach of trust or not (*n*), and although the consequences do not occur until after his death (*o*), and there is no difference between a loss occasioned by default and a loss occasioned by act (*p*).

Distinction where tortious act is a breach of a *quasi* contract :

e.g., breach of trust ;

On this principle an action can be maintained against the legal personal representatives of a deceased solicitor for want of exercise of reasonable care and skill in the performance of his duties as solicitor for the plaintiff (*q*).

negligence of deceased solicitor.

The rule that wrongdoers cannot have redress or contribution against each other, established by the case of

Restriction on rule of no contribution between tortfeasors.

(*h*) *Beaumont v. Kaye*, [1904] 1 K. B. 292.

(*i*) *Scott v. Morley*, (1887) 20 Q. B. D. 120, 124.

(*k*) *Com. Dig. Baron and Feme*, Y. 2 B., and see per *Lindley, L.J.*, in *Beck v. Pierce*, (1889) 23 Q. B. D. 316, 320.

(*l*) *Capel v. Powell*, (1864) 34 L. J. C. P. 168.

(*m*) *Concha v. Murieta*, (1889) 40 C. D. 543, 553, per *Cotton, L.J.*

(*n*) *Williams* (10th ed.) 1365.

(*o*) *Devaynes v. Robinson*, (1857) 24 B. 86, 95; *Grayburn v. Clarkson*, (1868) L. R. 3 Ch. 605.

(*p*) *Ibid.*

(*q*) *Blyth v. Fladgate*, [1891] 1 Ch. 337.

Merryweather v. Nixon (r), would seem to be confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act (s).

In cases of
breach of
trust.

As between two trustees who are in *pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other, unless the trustee claiming contribution is also a *cestui que trust* and has received as between himself and his co-trustee an exclusive benefit by the breach of trust (t), or unless there are other special circumstances, as where the acting trustee is the solicitor for the trust (u), or there has been such fraud that the Court would hold itself entirely aloof (x). But a passive trustee is not entitled to indemnity, as distinguished from contribution, from the acting trustee where a breach of trust has been committed unless there are special circumstances, as where a trustee has himself got the benefit of the breach of trust, or there has existed a relation which will justify the Court in treating him as solely liable for the breach of trust; for there is no rule that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee (y). The principles applicable between co-sureties seeking contribution apply equally between co-trustees, and it has been held that such right of contribution gives rise to a debt, in some cases in the nature of a specialty, in others of a simple contract (z). It follows that a right to contribution is enforceable against the estate of a deceased trustee (a).

Rule excluded
by Directors
Liability Act,
1890.

The ordinary rule that there shall be no contribution

(r) (1799) 8 T. R. 186.

(s) *Adamson v. Jarvis*, (1827) 4 Bing. 66, 73; *Palmer v. Wick and Pulteneytown Steam Shipping Co.*, [1894] A. C. 318, 324, 333.

(t) *Chillingworth v. Chambers*, [1896] 1 Ch. 685, 707.

(u) *Bahin v. Hughes*, (1886) 31 C. D. 390.

(x) See *Lewin on Trusts* (14th ed.) pp. 1150 *et seq.*

(y) *Bahin v. Hughes*, *ubi sup.*

(z) *Robinson v. Harkin*, [1896] 2 Ch. 415, 426, per *Stirling, J.*

(a) *Priestman v. Tindall*, (1857) 24 Beav. 244; and see *Re Harrison*, [1891] 2 Ch. 249, 253; *Re Jordan*, [1904] 1 Ch. 260, 263.

between tortfeasors is excluded by s. 5 from the particular class of tort coming within the Directors Liability Act, 1890 (b).

Although no action for waste, permissive or voluntary, as such, lies against the personal representatives of a tenant for life (c), yet a tenant for life, whether legal or equitable, is within the maxim *Qui sentit commodum sentire debet et onus*, and he cannot take the benefit without taking also the onus of the gift (d). Therefore as to leasehold property the tenant for life, and every successive owner of the lease, is bound, as between himself and the testator's estate, to perform the covenants and indemnify the estate (e). But where successive interests in leasehold property are given by Will without the intervention of trustees (f), the legal tenant in remainder has no claim on coming into possession against the personal representatives of the deceased tenant for life in respect of dilapidations of the property suffered during his life, although if there had been a claim by the lessor against the testator's estate the executors of the testator could have recovered against the estate of the tenant for life for waste during the life interest, but not against the tenant in remainder (g). It would seem that the reason is that the only liability or obligation of the tenant for life is as assignee to indemnify the testator's estate against breach of covenant in the lease while enjoying the benefit given to him under the Will, and on his death the remainderman need not accept what is left if he objects to the liability (h).

Liability of personal representative of deceased tenant for life of leaseholds for waste: where there is no express obligation in the Will.

Where, however, an express obligation arises under the Will, as if a person has an estate given to him with an obligation imposed upon him of keeping that estate in repair, if the obligation is not performed there is, in equity, a claim upon the party so failing during his life, or against his estate after

Liability of personal representative where there is an express obligation in the Will.

(b) *Gerson v. Simpson*, [1903] 2 K. B. 197.

(c) *Phillips v. Homfray*, (1889) 24 C. D. 439, per Bowen, L.J., at p. 455; and see *Re Cartwright*, (1889) 41 C. D. 532, as to permissive waste.

(d) See *ante*, p. 360, and *post*, p. 420.

(e) *Kingham v. Kingham*, [1897] 1

I. R. 170; *Re Betty*, [1899] 1 Ch. 821; *Re Giers*, [1899] 2 Ch. 54.

(f) Cf. *Re Fowler*, (1881) 16 C. D. 723, as to the duty of trustees.

(g) *Parry v. Hopkin*, [1900] 1 Ch. 160.

(h) Cf. *Re Courtier*, (1886) 34 C. D. 136.

his decease; and where the legal estate is vested in trustees, the trustees, as representing the inheritance and for the benefit of all the successive equitable owners, are the proper persons to raise the question and to bring in the claim in the course of the administration of the estate of the tenant for life (i), but there would seem to be no reason why this equitable claim should not be enforced at the instance of a succeeding beneficiary (k).

Liability of personal representative of copyhold tenant where there is custom to repair.

So a tenant at will of copyhold tenements who accepts his tenancy upon the terms of the custom of the manor that he shall keep the premises in repair impliedly contracts to discharge the customary obligation to repair, and for breach of this implied contract the lord has a right of action against the personal representatives of the deceased tenant (l).

Liability of personal representative of deceased incumbent for dilapidations.

Again, the liability of the personal representative of a deceased incumbent for dilapidations is not considered as arising from a tort in the testator, but as a duty or obligation which he ought to have performed, and in respect of which his estate is liable (m).

SECT. 2.—*Liability for his own Acts.*

(1) *On Obligations Ex Contractu.*

Personal liability on his own contracts.

It would seem on the authorities that the only cases in which an executor or administrator may be sued as executor or administrator on a promise made by him as executor or administrator, so as to charge him no further than in his representative capacity, are where the consideration for the promise of the executor or administrator was a contract or transaction with the testator or intestate; and the cases show that no contract can be made with an executor or administrator which will not charge him personally, but the assets of the testator. For although an executor or administrator has power to give a lien or charge on specific assets, a person

(i) *Re Williames*, (1885) 52 L. T. 41, and (C. A.) 54 L. T. 105.

(k) *Ibid.*; and see *Batthyany v. Walford*, (1886) 33 C. D. 624; 36 C. D. 269.

(l) *Blackmore v. White*, [1899] 1 Q. B. 293.

(m) See *ante*, p. 360; and *Williams* (10th ed.) 1362 *et seq.*

cannot by contract with an executor or administrator acquire a right to prove as a creditor against the estate (n).

Where the executor or administrator is sued on his own contract, it is immaterial, so far as regards his liability, whether he contracted in his representative capacity or not, or whether the testator or intestate left assets or not (o).

An executor or administrator who carries on the business of his testator or intestate makes himself personally liable, *de bonis propriis*, for all the debts contracted by him in so acting, whether he is entitled or not entitled to be wholly, or to any extent, indemnified out of the estate, and whether it is sufficient or insufficient for the purpose, and it makes no difference that he acted avowedly in the character of executor or administrator (p).

Liability in carrying on business of deceased.

Although a creditor of the executor or administrator has no direct claim against the estate of the testator or intestate, yet he has a right to be substituted to the right of the executor or administrator to indemnity (q).

Creditor entitled to be substituted to debtor's right to indemnity.

Executors or administrators are entitled to carry on a business of the testator or intestate for such reasonable time as is necessary to enable them to sell his business property as a going concern, and in such case are entitled, even as against the testator's or intestate's creditors, to an indemnity in respect of the liabilities properly incurred in so doing (r).

When right to indemnity exists.

Where a business has been carried on under an authority conferred upon the executors by the Will, they are entitled to a general indemnity out of the estate as against all persons claiming under the Will, but they cannot by reason only of such authority maintain this right against the creditors of the testator (s). The propriety of the executor's or

Effect of carrying on business under authority in Will.

(n) See per Mellish, L.J., in *Farhall v. Farhall*, (1871) L. R. 7 Ch. 123.

(o) Williams (10th ed.) 1416, 1423.

(p) *Labouchere v. Tupper*, (1857) 11 Moo. P. C. 198, 221.

(q) *Re Evans*, (1887) 34 C. D. 597.

(r) *Dowse v. Gorton*, [1891] A. C. 190, 199, per Lord Herschell. This principle applies with greater force

against the creditors of the testator where the business is carried on by a receiver and manager for the creditors appointed by the Court in administration proceedings. *Re Brooke*, [1894] 2 Ch. 600.

(s) *Dowse v. Gorton*, *ubi sup.*, at p. 199.

administrator's conduct in carrying on the business, as between himself and those beneficially interested in the estate, does not give the creditors of the trade, becoming so after the death, the rights of creditors of the testator or intestate (t).

Limit to the right to indemnity.

If the business is carried on in accordance with the provisions of the Will the indemnity of the executors is only limited by the amount of the assets which the testator has authorised the executors to employ in the business, and it is not limited to that portion of the assets which may have come into existence or changed its form since the testator's death (u).

Effect of carrying on business without any authority.

Where there is no provision in the Will to continue the business, and the executor continues it, not for the purpose of winding it up and selling it as a going concern in the interests of the creditors, but on his own behalf, he is not entitled to any indemnity, and the assets will be divided among the creditors of the testator in priority to the claims of creditors in respect of goods supplied to the executor for the purpose of carrying on the business after the testator's death (x).

Effect of creditors of testator assenting to business being carried on.

But if the creditors of the testator must be taken to have known of and assented to the business being carried on, and for a length of time which would preclude it being suggested that it was carried on only for the purpose of selling it as a going concern, they lose their right to prior payment out of the testator's assets, and the executors will be entitled to indemnity (y).

Further, if the business is carried on by the executors at the instance of the old creditors, without regard to the terms of the Will, the executors, it would seem, would have the ordinary rights of agents against their principals, and would be entitled to look to the old creditors for indemnity for what they had done in this behalf (z).

(t) *Labouchere v. Tupper*, *ubi sup.*

(u) *Dowse v. Gorton*, per *Ld. Macnaghten*, at p. 208.

(x) *Re Millard*, (1895) 72 L. T. 823.

(y) *Hodges v. Hodges*, [1899] 1 Ir. R. 480.

(z) *Ibid.*; and see *Re Millard*, *ubi sup.*, per *Smith, L.J.*, at p. 827.

Although where the executor carries on the business of his testator under a direction contained in the Will, his creditors are entitled to stand in his place and to claim the benefit of his right to resort for indemnity to the assets authorised to be employed in carrying on the business, yet in such case, if the executor is in default, not being himself entitled to an indemnity except upon terms of making good his default, his creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good (a).

Effect of executor being in default on his right to indemnity.

But the indemnity to the executors is not to the executors as a body, but to each of them who has acted properly, and therefore, excluding the case of an executor who may be responsible for the acts of his co-executor, an executor who has a clear account is entitled to an indemnity for what he has properly done independently of the question whether another executor has been found a defaulter or has committed a breach of trust, and consequently a creditor entitled to sue the executor is entitled to the benefit of his indemnity (b).

Default of one executor will not prejudice.

In the administration of an estate, where the testator's or intestate's business has been carried on after his death by the executors or administrators under such circumstances as to entitle them to indemnity, the creditors of the business, entitled by subrogation to the equities of the executors or administrators, or of any one of them, can enforce their rights in pending administration proceedings by applying for an inquiry what debts and liabilities have been properly incurred in carrying on the business since the death and remain due to the applicants and other creditors of the executors or administrators and for payment (c), or if there is no other proceeding pending an order for administration may be made at the suit of such a creditor as plaintiff (d).

Creditors entitled by subrogation may enforce their rights directly.

The 4th section of the Statute of Frauds (29 Car. II. c. 8) enacts that no action shall be brought whereby to charge any

Effect of s. 4 of Statute of Frauds with regard to special promise to answer damages.

(a) *Re Johnson*, (1880) 15 C. D. 548.

(c) *Ibid.*

(b) *Re Frith*, [1902] 1 Ch. 342.

(d) *Re Shorey*, (1898) 79 L. T. 349.

executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Entire agreement must be in writing.

Promise must be by executor or duly constituted administrator.

Promise requires consideration to support it.

When instrument itself imports consideration,

The entire agreement, including the consideration for the promise as well as the promise itself, must be in writing (e). Moreover, the person making the promise must be either the executor whose title is derived from the Will, or the administrator after grant. A promise by a person, not being an executor, before the grant to him of administration, is not within the statute, and is therefore valid if for sufficient consideration, although not in writing (f).

The words of the statute are merely negative, and the agreement is still liable to be tried as all other agreements merely in writing are by the common law, unless under seal there must still be a sufficient consideration to support the agreement in an action upon it to charge the executor or administrator *de bonis propriis*. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right, but where the declaration stated that the defendant being indebted as administratrix promised to pay when requested, it was held there was no sufficient consideration to support the demand against her in her personal capacity, for she derived no advantage or convenience from the promise made (g).

Although a promise to pay that which the person promising is under no legal or moral obligation to pay may be considered

(e) *Maunders v. Wakefield*, (1821) 4 B. & Ald. 595. Sect. 3 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), would seem to apply to contracts of suretyship or guaranty only (see Pollock on Contracts (7th ed.) p. 158), and would therefore not affect this decision so far as regards

any special promise by an executor or administrator.

(f) *Tomlinson v. Gill*, (1756) Amb. 330.

(g) *Rann v. Hughes*, in note to *Mitchinson v. Hewson*, (1797) 7 T. R., 348, 350.

nudum pactum, yet this does not apply to an instrument importing a consideration and which may induce forbearance. Consequently in *Ridout v. Bristow* (h), where a widow administratrix gave a promissory note "for value received by my late husband," it was held that the act of giving such a security supersedes the necessity of an investigation as to there being assets, and that it was not competent for the defendant to show that there were no assets. So in *Childs v. Monins* (i) a promise to pay on demand was held to be tantamount to an admission of assets to satisfy the demand when made, and an engagement to pay interest until demand an inducement to suspend demand. But it would seem the effect of the note or bill may be controlled by a written contemporaneous agreement forming together one contract (k), so that if it appear that the arrangement was that the note or bill given by the executor or administrator was merely to give the creditor the same advantage as a judgment of assets *quando acciderint*, in that case it is no admission of assets on which the executor or administrator would be held personally liable (l).

Although an executor or administrator who advances money of his own for the purpose of paying creditors of the estate is entitled to be recouped in full in priority to other creditors (m), yet an executor or administrator, who makes himself liable for debts of the deceased, as by giving promissory notes to creditors of the deceased in the course of carrying on the deceased's business after his death, has no priority in respect of such debts over the other creditors of the deceased, but stands in the same position as the creditors for whose debts he has made himself liable (n).

Distinction between advancing money to pay creditors and giving promissory notes to creditors.

Where any person is under obligation to indorse a bill of exchange in a representative capacity, he may, under s. 31 (5) of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), indorse the bill in such terms as to negative personal liability.

Personal liability under the Bills of Exchange Act, 1882, may be negated.

(A) (1830) 1 Cr. & J. 231; 35 R. R. 710.

4 Taunt. 844.

(i) (1821) 2 Brod. & B. 460.

(m) Spackman v. Holbrook, (1860)

2 Giff. 198.

(k) Maitland v. Page, (1870) L. R. 5 Ex. 312, 319.

(n) Lucas v. Williams, (1862) 10 W. R. 677.

(l) Bowerbank v. Monteiro, (1813)

Effect of submission to arbitration.

Executors and administrators have power under s. 21 (2) of the Trustee Act, 1893 (56 & 57 Vict. c. 58), to submit to arbitration any debt, account, claim or thing whatever relating to the testator's or intestate's estate without being responsible for any loss occasioned thereby.

A submission is in general considered as a reference not only of the cause of action, but also of the question whether or not the executor or administrator has assets (*o*). Therefore, if there are no assets to answer the award if made against him, the executor or administrator ought not to put the other party to the expense of arbitration without protest; as in that case, if the submission is in general terms, it may amount to an admission of assets (*p*). But on a general reference an arbitrator is not justified in rejecting evidence to show that there are no assets. The form of the award will determine whether the executor or administrator is personally liable to pay or whether the payment is only out of assets (*q*); and if the arbitrator awards the executor or administrator to pay a certain sum, it is equivalent to determining that assets exist (*r*).

(2) On Obligations *Ex Delicto*.

The subject of the liability of an executor or administrator for a devastavit is considered in a later part of this work (*s*). It is intended here to deal with his liability to third parties in his individual character, and his right to indemnity in respect thereof out of the assets. In this relation there is no distinction between an executor or administrator and an ordinary trustee.

Personal liability for his own tort.

As no contract can be made with an executor or administrator which will not charge him personally (*t*), *à fortiori* a tort committed by him must charge him personally; and it

(*o*) *Re Wansborough*, (1815) 2 Chitt. Rep. 41.

(*p*) *Riddell v. Sutton*, (1828) 5 Bing. 200.

(*q*) See Russell on Arbitration and

Award (9th ed.), pp. 36, 252, and also Williams (10th ed.) 1424.

(*r*) *Re Wansborough*, *ubi sup.*

(*s*) See Chap. XLV.

(*t*) See *ante*, p. 380.

is immaterial, so far as regards his liability, whether he has assets of his testator or intestate or not.

The standard of duty which regulates the liability for tort arising from negligence between individuals is not the same as that which is applied between trustee and *cestui que trust*. Apart from any relation of trustee and *cestui que trust*, negligence is defined to be "the breach of that duty which in certain cases the law imposes to exercise such skill or care as is reasonable under the circumstances of each particular case" (u). On the other hand, as a general rule, a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own (x).

When entitled to indemnity out of the estate.

If a trustee in the management of the trust estate commits a tort—for instance, if in carrying on a colliery business he lets down the surface of the land and injures buildings of an adjoining owner—damages may be recovered against him personally by the person injured; but if the injury has been occasioned by the trustee in the reasonable management of the estate he is entitled to be indemnified out of the assets (y).

So also where a trustee properly employs an agent to do some act who makes a mistake, although the consequences of such act subjects the trustee to legal liability to a third party, as, for instance, where he employs an agent to fell trees and injury is caused to a passer-by, yet the liability as between the trustee and the estate must be borne by the estate (z).

Whenever a trustee in the ordinary and reasonable management of the trust estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably, is entitled to be indemnified out of the estate (a).

(u) Addison on Torts (8th ed.) 701.

(w) Speight v. Gaunt, (1883) 9 A. C. 1, 19; and see *post*, p. 573.

(y) *Re Raybould*, [1900] 1 Ch. 199.

(z) *Benett v. Wyndham*, (1862) 4 De G., F. & J., 259.

(a) *Re Raybould*, *supra*.

Person recovering damages may avail himself of the right to indemnity.

Moreover, it has been held on the principle of *Dowse v. Gorton* (b), where damages have been recovered against a trustee in respect of a tort the person so recovering can avail himself of the trustee's right to indemnity so as to obtain payment of the damages and costs so recovered direct out of the trust estate (c).

(b) [1891] A. C. 190; *ante*, p. 381

(c) *Re Raybould*, *ubi sup.*

CANADIAN NOTES.

The applicable sections of the English Statute, 3 and 4 Wm. IV. c. 42, have been re-enacted in the several provinces.

An agreement to serve an employer as clerk for a term of years is a personal contract, and, as such, is determined by the death of the employer, and the fact that the deceased employer, in his will, directs his executors to dismiss the employee, which they do, is immaterial. *Grant v. Johnson et al.* (1864), 5 N.S.R. 493. Personal contract.

Where the contract sued on, made with the testator, would not have been binding if the testator were alive, his executors were held not liable on it. *Institute of Ladies of the Sacred Heart v. Matthews* (1861), 10 U.C.C.P. 437.

In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud, unless profit has accrued to the wrong doer's estate. *Hamilton Provident and Loan Society v. Car-nell* (1884), 4 O.R. 623. Fraud.

An action cannot be maintained against executors representing the estate for an infringement of patent by their testator unless, *semble*, it be made to appear that by reason of the wrongful act complained of property of a tangible character had passed from the plaintiff to the testator, as distinguished from the testator's merely saving of expense by the unauthorized use of the invention. *Leslie v. Calvin* (1885), 9 O.R. 207.

A testatrix induced A., a woman, not a relative, to come from the United States to Nova Scotia and live with her, and secured from A. the performance of certain services of an onerous character. A. admittedly expected the property of the testatrix to be left to her, but there was no express understanding or agreement that she was to be remunerated by will or in any other way. By the will of the testatrix A. was Claim for services.

given a share of the residue. A. claimed against the estate upon a *quantum meruit* for the value of her services. The Judge of Probate disallowed her claim, but, on appeal to the Full Court it was allowed. *In re Ansley* (1907), 41 N.S.R. 527.

Where services are performed for a testator under such circumstances as to give rise to an implied contract to pay therefor, there can be a recovery against the estate notwithstanding that the claimant is a legatee of the estate. *Contra*, if there was an agreement to accept the legacy as remuneration. *McGugan v. Smith* (1892), 21 S.C.R. 263; *In re Ansley*, *supra*.

Where a husband's conduct towards his wife was such that she was unable safely or comfortably to remain in his house, she has the right to pledge his credit for the suitable maintenance of herself and her children, and where the wife's father had, for several years, supported his daughter and grandchildren, but made no claim against the husband during his lifetime, and after his death made a claim against his estate, he was held entitled to recover. The executor, under the peculiar circumstances, was justified in resisting payment and was allowed his costs of litigation on the administration of the estate. *Griffith v. Patterson* (1870), 20 Gr. 615.

On the death of a husband before judgment in an alimony action, the solicitor was held entitled to recover his costs against the executors of the husband's estate, as for necessities. *Kerr v. Rickard* (1888), 8 C.L.T., Occ. N. 335.

R.S.O. 1897, c. 129, s. 11, providing that a person wronged in respect of his person or property by one, since deceased, may maintain an action against the administrators or executors of the latter, does not authorize such an action against an administrator *ad litem* merely, but only against an executor or general administrator, clothed with full power to collect the assets, pay the debts and divide the estate. *Hunter v. Boyd* (1902), 3 O.L.R. 183.

Under R.S.N.S. (1900), c. 177, s. 2, dealing with actions against executors for injuries done by the testator, although

the action is brought in the lifetime of the testator, if he dies before judgment there can be no recovery against the estate, if six months have elapsed between the acts complained of and his death. *McDonald v. Dickson* (1905), 40 N.S.R. 560.

Where, after the commencement of an action for injury occasioned by negligence and improper conduct of the defendant in the management of a vessel, defendant died, it was held that the action could not be revived against his executor. *Cameron v. Milloy* (1872), 22 C.P. 331.

As stated in the text at page 372, "there is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration," but, in Canada, statutes requiring corroboration have become general. Indeed, at one stage of the legislation, a provision that the evidence of the claimant was not admissible was not uncommon. Later statutes render the claimant's evidence admissible, but insufficient unless corroborated.

Corroboration.

In *Chesley v. Murdoch*, 2 S.C.R., it was decided that, under the then existing Nova Scotia Statute, even in an action against administrators, made parties to the action after issue joined but before trial, the plaintiff cannot give any evidence in his own favour of dealings with the defendant. *Chesley v. Murdoch* (1877), 2 S.C.R. 48.

Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of and endorsed by the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances. *Re Jelly, Union Trust Co. v. Gamon* (1903), 6 O.L.R. 481. See further as respects corroboration, *Wilson v. Howe* (1903), 5 O.L.R. 323.

For a statement of the effect of section 10, Ontario Evidence Act, R.S.O. 1897, c. 61, see *McClenaghan v. Perkins* (1903), 5 O.L.R. 129.

The corroboration required in an action against the estate of a deceased person, by section 50 of the British Columbia Evidence Act (B.C. Statute 1900, c. 9, s. 4), must refer specifically to the contract on which the action is based, and not to some part of it, so as to leave the effect of the whole unascertained. *Blacquiere v. Carr* (1904), 3 B.C.R. 448.

A Judge, sitting on the Probate side of the Court, passing accounts, is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only where the claim comes to be contested in Court. The responsibility of paying claims falls upon the administrator, he must use care and judgment in considering them, and if he does so fairly and honestly, and in the interest of the estate, he will, on passing his account, be allowed such as he has thought fit to pay. *Re Blank Estate* (1901), 5 Terr. L.R. 200.

A person supplying goods to an executor for the purposes of carrying on the testator's business for the benefit of the estate, under authority given by the will, has no right of recovery against the estate, but he may sue the person who incurred the debt, and he has also the right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred. *Braun v. Braun* (1902), 14 Man. R. 346, where Killam, C.J., refers to the recent English cases.

See also cases relating to corroboration, cited at page 388g post.

Where an administratrix rightfully and unavoidably carried on the business of the deceased for a time and made losses and, in addition, certain assets of such business excusably unsold for a time after the business had been sold, were destroyed by accidental fire, the administratrix was held not liable to make good such loss. *Re Nugent* (1905), 2 W.L.R. 3.

An estate in the hands of an administrator is not liable for work done or services performed at the request of the administrator, although the estate gets the benefit of the work

Executor
carrying
on
business.

and services, but the administrator is liable in his personal capacity in such a case. *Dean v. Lehberg* (1907), 17 Man. R. 64.

A widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors. Held, that the creditors had no charge against the estate, but must proceed against the executors personally. *Campbell v. Bell* (1869), 16 Gr. 115.

The defendants signed a promissory note as executor of an estate for his testator's debt and was held personally liable thereon. *Union Bank of Canada v. McRae* (1901), 21 C.L.T., Occ. N. 409 and 496.

Executors indorsed a promissory note (received by them for the sale of personal property of the testator), "without recourse," to the plaintiff. The holder of the note recovered judgment thereon against the executors, and the parties interested in the testator's real estate were allowed to shew that the judgment was not for a debt due by the testator. *Ianson v. Clyde* (1899), 31 O.R. 579.

Where an agent, employed by executors to do the business of an estate, is given authority, by power of attorney, to sign or indorse promissory notes with the executors' names for the purposes of the estate, *semble*, that takers of the notes are put upon enquiry as to whether the notes are for the purposes of the estate, and that if not the executors are not liable thereon. *Gore Bank v. Meredith* (1866), 26 U.C.Q.B. 237; *Gore Bank v. Crooks* (1867), 26 U.C.Q.B. 251. For the law of Quebec respecting indorsements, etc., by executors see *Lionais v. Molsons Bank* (1883), 10 S.C.R. 526.

Executors conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, etc., in the deed, for good title. Held, that they were personally liable and that the grant by them, as executors, could not control their express covenant. *McDonald v. McDonald* (1841), 6 U.C.Q.B. (O.S.) 109.

Express
covenant.

Executors, who were also residuary legatees, acting *bona fide* under a judgment, afterwards held to be irregular, re-

tained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud or misconduct. They were held not chargeable with interest. *Boys' Home v. Lewis* (1902), 3 O.L.R. 208.

Executors as contributors.

Executors allowed bank stock, which came into their hands as assets from their testator, to remain undisposed of, and received the dividends. By the terms of the bank charter the stockholders were individually liable for the payment of debts of the bank in proportion to the stock they held. The bank suspended payment, was wound up, and a call was made on the executors as contributors. They were held liable in their representative capacity, and it was further held that the payment of legacies, under the will, could not be allowed against their contingent liabilities under the charter. *McKenzie, Curator, etc. v. King* (1871), *Steven's Digest*, N.B.R. 376.

A window fell from a building and killed a pedestrian in the street below. The building formed part of the general estate of a testator, but it had been specifically bequeathed to one G. F. and his children, for whom the executors were also, under the will, trustees. The widow sued the executors and trustees as such and also personally for damages for negligence. The Supreme Court of Canada held them liable personally, and as trustees, but not liable as executors of the general estate. *Ferrier v. Trepannier* (1894), 24 S.C.R. 86.

Executors of sureties.

The executors of sureties are responsible for the defalcation of the principal, committed after the death of the testator, and even after notice that they would not be liable. *The Queen v. Leeming* (1850), 7 U.C.Q.B. 306.

Where the agent of an executor misappropriates the funds of the estate the executor is responsible. *Low v. Gemley* (1890), 18 S.C.R. 685.

Where executors act honestly and reasonably upon a mistaken construction of a will, thereby committing technical breaches of trust, they may be relieved under 62 Viet. 2nd session, c. 15. *Henning v. McLean* (1901), 2 O.L.R. 169.

Where each item in an account against the estate of a deceased person is an independent transaction and stands upon its own merits and would constitute a separate and independent cause of action, some material corroboration of the testimony of the party interested in enforcing the demand must be adduced as to each item in order to satisfy the tenth section of the Evidence Act, R.S.O., c. 63. *Re Ross* (1881), 29 Gr. 385.

Each independent transaction requires corroboration.

In a claim for money lent and interest agreed upon, where there is corroboration as to the main fact, namely the borrowing of the money, such evidence is sufficient to entitle the plaintiff to recover the interest claimed. *Secor v. Gray* (1902), 3 O.L.R. 34.

Corroborating main fact sufficient.

In Manitoba and Alberta, although the evidence of a claimant against the estate of a deceased person should be clear and convincing, there is no absolute rule of law requiring corroboration. *Doidge v. Minns* (1900), 13 Man. R. 48; *Bakewell v. Mackenzie* (1905), 6 Terr. L.R. 257.

The enactment respecting corroboration (R.S.O. 1897, c. 73, s. 10) demands corroborative evidence of a material character supporting the case to be proved by such "opposite or interested party" in order to entitle him to a judgment. Unless it supports that case, it cannot properly be said to "corroborate." A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case. *Thompson v. Coulter* (1903), 34 S.C.R. 261. The direct testimony of a second witness is unnecessary;

Scintilla not sufficient.

Circum-
stances may
afford
corroboration.

the corroboration may be afforded by circumstances. *McDonald v. McDonald* (1903), 33 S.C.R. 145. See also *Stoddart v. Stoddart*, 39 U.C.Q.B. 203; *McKay v. McKay*, 31 U.C.C.P. 1; *Tucker v. McMahon*, 11 O.R. 718; *Radford v. McDonald*, 18 A.R. 167; *Re Stasbler*, 21 A.R. 266; *Green v. McLeod*, 23 A.R. 676; *Curry v. Curry* (1900), 32 O.R. 150.

CHAPTER XXX.

OF SET-OFF.

SET-OFF in an action is a right given by statute (a) to a man who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued (b). There was no set-off at common law, each party had to bring a separate action, and there can be no set-off except in cases in which the statute gives a right of set-off (c).

A statutory right.

The stat. 2 Geo. II. c. 22, s. 13 (confirmed and made perpetual by 8 Geo. II. c. 24, s. 4), provides that "if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party one debt may be set against the other."

Mutual debts may be set off.

Set-off may, in general, be pleaded wherever the claims on both sides are liquidated debts which can be ascertained with certainty at the time of pleading. But in order to give the right the debts must be between the same parties and in the same right (d). For instance, a defendant cannot set off a personal debt against a debt due to the plaintiff as executor (e), nor a debt due to him as executor against a debt due to the plaintiff personally (f).

Both claims must be liquidated debts.

Between the same parties and in the same right.

Further, to an action by an administrator, who sues in his representative character, for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime (g).

(a) 2 Geo. II. c. 22, and 8 Geo. II. c. 24.

(b) See per Ld. Davey in *Williams v. North's Navigation Collieries* (1889) Ltd., [1906] A. C. 136, 141.

(c) Per North, J., in *Re Gregson*, (1887) 36 C. D. 223.

(d) See Bullen & Leake on Pleading

(6th ed.) (1905), 773 *et seq.*

(e) *Hutchinson v. Sturges*, (1741) Willes, 261.

(f) *Bishop v. Church*, (1748) 3 Atk. 691; *Gale v. Luttrell*, (1828) 1 Y. & J. 180; *Re Gregson*, *ubi sup.*

(g) *Rees v. Watts*, (1855) 11 Exch. 410.

So also to an action by the administrator for a debt due to the intestate in his lifetime, the defendant cannot set off a debt which accrued due from the estate after the death of the intestate, as, for instance, on a promissory note made by the intestate which did not become due until after the intestate's death (h).

Again, defendants being sued as executors for a debt which accrued due from the testator in his lifetime cannot set off a debt which accrued due from the plaintiff to them as executors since the death of the testator (i).

But an account stated by an executor as such must be taken to show a debt due from his testator to the other party, and against this a debt due from that other party to the testator may be set off (k).

There is no principle which requires a different rule as to set-off in equity (l).

The same principle applies to counter-claims (m).

Equitable
set-off.

But although demands due in different rights cannot be set off—the principle being, that one man's money shall not be applied to pay another man's debt—yet where a plaintiff suing in his representative character is entitled also beneficially to the debt, as, for instance, by becoming entitled to a bond debt not only as administrator but as sole next-of-kin, all administration expenses being discharged, the defendant is entitled in equity to set off sums due to him from the plaintiff personally for monies advanced (n).

So also where a banking firm stopped payment and the defendant at the time had an overdrawn account and also an account in credit "as executor," and there being under the circumstances no such equities as to prevent the defendant treating the balance to the executorship account as a fund to

(A) *Newell v. The National Provincial Bank of England*, (1876) 1 C. P. D. 496.

(i) *Rees v. Watts*, *ubi sup.*, at p. 416, per Coleridge, J.

(k) *Ibid.*

(l) *Newell v. National Provincial*

Bank of England, *ubi sup.*, per Lindley, J.

(m) *Macdonald v. Carrington*, (1878) 4 C. P. D. 28.

(n) *Jones v. Moscop*, (1844) 3 Hare, 568.

which he was beneficially as well as legally entitled, it was held he was entitled to set it off against the claim in an action on the overdrawn account by the trustee in the bankruptcy of the banking firm (o).

In *Ex parte Morier* (p) there were two accounts, one the account of A., the other the account of A. and B., and it was said A. and B. were executors and A. was also the residuary legatee, and therefore entitled to the whole of the fund. But it appeared that the executors were jointly liable for some rates and taxes, and a solicitor's bill of costs which had not been paid, so that the fund had never been liquidated so as to become the trust fund of A.; and consequently it was held there could not be an equitable set-off, since where money is due in *autre droit* the only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of the one man in the name of another, not when the result of taking the accounts would be to show that the ultimate balance would be his property.

No equitable set-off where to establish equitable title account necessary.

So a debt due to the administrator of an intestate in his own right from one of the next-of-kin may be set off in a suit by the next-of-kin for administration of the estate against a sum due from the administrator in respect of the next-of-kin's share of the intestate's estate (q), and it does not make any difference that the share of the next-of-kin has been paid into Court (r).

Set-off of debt due to administrator in his own right from next-of-kin.

Neither at law nor in equity would a set-off be allowed against the assignee of an equitable chose in action of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it (s). But every person who takes an assignment, whether by mortgage or otherwise, of a share in the hands of a legal personal representative, must take subject to the settlement of accounts as between

No set-off against assignee of equitable chose in action in respect of subsequent debt.

(o) *Bailey v. Finch*, (1871) L. R. 7 Q. B. 84.

(p) (1879) 12 C. L. 431.

(q) *Taylor v. Taylor*, (1875) L. R. 20 Eq. 155.

(r) *Re Jones*, [1897] 2 Ch. 190, 203.

(s) *Watson v. Mid-Wales Railway Co.*, (1867) L. R. 2 C. P. 593; *Re Milan Tramways Co.*, (1880) 22 C. D. 122.

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the assignor and the legal personal representative; and it matters not whether those accounts are accounts in the administration of the estate, or accounts between the assignor and the legal personal representative (*t*).

Equitable set-off can only arise where there is some equitable defence, or where one debt is legal and the other equitable (*u*).

The procedure as to set-off and counter-claim in an action is now regulated by Ord. 19, r. 8, of R. S. C., but the Judicature Acts did not alter the rights of parties, they only affected procedure (*x*).

Judicature
Acts only
affect pro-
cedure.

(*t*) *Re Jones, ubi sup.*

(*u*) *Re Milan Tramways Co.*, (1884)
25 C. D. 587, 593, per Fry, L.J.

(*x*) *Stumore v. Campbell & Co.*
[1892] 1 Q. B. 314, 316.

CANADIAN NOTES.

In an action by a creditor against an executrix *de son tort* she cannot set off a debt due from the plaintiff to the testator. *Cameron v. Cameron* (1873), 23 U.C.C.P. 289. Set-off.

A father made advances to his daughter's husband upon her share of the father's estate. In a suit by the wife in the husband's lifetime for administration, the executors were allowed to set off the advances against the wife's share. *Torrance v. Chervett* (1866), 12 Gr. 407. Advances.

A testator had a deposit to credit in a bank at the time of his death, also a discounted promissory note, in the same bank, not yet due. The deposit remained until maturity of the note. The bank was held entitled to set off the note against the deposit and rank on the estate for the balance. *Ontario Bank v. Routhier* (1900), 32 O.R. 67.

An individual debt cannot be set off against a demand due in the capacity of executor nor *vice versa*. *Gracey v. Wilson* (1844), 1 U.C.Q.B. 237; *Devlin v. Jarvis* (1840), E.T. 3 Viet. Ont. Dig. Case Law 6354; and see *Goldsmith v. Smith* (1870), 17 Gr. 213; *Moffatt v. Foley* (1867), 26 U.C.Q.B. 509; *Sifton v. Caldwell* (1897), 11 Man. R. 653; *Curry v. Hibbard* (1836), Stevens' Dig. (N.B.) 708.

In *Moffatt v. Foley*, *supra*, an action to recover moneys received by the testator to the use of the plaintiff, the testator having received the moneys in the capacity of Clerk of a Division Court, the defendant pleaded that she, as executrix, sued the plaintiff for moneys due by the plaintiff to the testator in his lifetime, and recovered a judgment as executrix against the defendant, and she claimed to set off against the plaintiff's claim the amount so recovered. It was contended that the judgment could not be pleaded by way of set off. Morrison, J., who delivered the judgment of the Court, referring to the Statute of Set-off, said: "The

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object of the Act was to put an end to cross-actions, and when the Statute was made perpetual by 8 Geo. II. ch. 24, it was amended to set at rest doubts as to its application to debts which in law would be deemed of a different character. The debts here originally existed between the plaintiff and the testator, and were mutual debts at the time of the testator's death, and the representative of the one could set off her testator's debt against that of the other."

CHAPTER XXXI.

OF STATUTES OF LIMITATIONS AS AFFECTING PARTICULARLY EXECUTORS AND ADMINISTRATORS.

WHERE there is a cause of action, and a person who can be sued, the Statute of Limitations begins to run, and having begun it continues to run, notwithstanding the death of the person to whom the right of action accrued (*a*).

The statute continues to run notwithstanding subsequent death.

A cause of action cannot be said to exist unless there be a person in existence capable of suing; so that if the statute has not begun to run during the life of an intestate, then it does not begin to run until letters of administration to his estate have been taken out (*b*). So if a creditor dies intestate on the day a debt becomes payable, and there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not begin to run until after administration granted (*c*).

No cause of action until there is a person in existence capable of suing.

Where the right of action accrued after the death of a person who if he had been living could have sued, if he leaves an executor, who proves the Will, inasmuch as the executor could sue before probate the statute begins to run from the death of the testator, but if he omits to appoint executors, or all the executors die without acting, or all renounce, it would seem the rights are the same as if the testator had died intestate (*d*).

Executor can sue before probate.

Since no one has a complete cause of action until there is somebody that he can sue, it follows that the statute only runs from the time that an executor has either acted or

No cause of action until there is a person who can be sued.

(*a*) Penny v. Brice, (1865) 18 C. B. (N. S.) 393; Boatwright v. Boatwright, (1873) L. R. 17 Eq. 71, 74.

(*b*) Murray v. The East India Co., (1821) 5 B. & Ald. 204; Burdick v. Garrick, (1870) L. R. 5 Ch. 233; but

see *post*, p. 400.

(*c*) Atkinson v. Bradford Building Society, (1890) 25 Q. B. D. 377.

(*d*) See Darby & Bosanquet on the Statutes of Limitations (2nd ed.) p. 48.

Executor can-
not be sued
until he has
proved or
acted.

Effect of
plaintiff
dying pend-
ing action.

proved the Will (e). Further, acts done by an executor abroad will not constitute him an executor in this country so as to enable him to be sued in this country (f).

The old cases show that where an action was commenced and the plaintiff died during the pendency of the action, his representatives, if the cause of action was one that survived to them, might commence a new action within a reasonable time, notwithstanding in the meanwhile the period of limitation had expired; and in the case of the death of a defendant, the plaintiff might commence a new action within a reasonable time after probate of the Will or grant of administration. The Common Law Procedure Act enacted that in such cases the action should not abate, and that provision has been repeated in Ord. 17, r. 1, of the R. S. C. and under rules 2 and 4 orders may be obtained to make the personal representative a party and to carry on the proceedings between the continuing parties and such new party or parties. This however was the mere giving of a new remedy, and does not prevent a person bringing a new action under circumstances in which he could before have brought such a new action, as in the case of the death of the defendant before service of the writ (g).

Effect of
creditor suing
on behalf of
himself and
all others.

Formerly, if a creditor sued on behalf of himself and all others, every creditor was said to have an inchoate interest in the suit to the extent of its being considered as a demand and to prevent his being shut out because the plaintiff did not obtain a decree within six years (h). But now, owing to the change of practice, a creditor has no such inchoate interest in a suit for administration, whether commenced by another creditor or by an executor, until decree; consequently a judgment for administration will not now save a claim if it is not pronounced till after the expiration of six years from the time the debt was incurred (i).

(e) *Douglas v. Forrest*, (1828) 4 C. D. 250.
Bing. 686.

(f) *Wood v. Patterson*, (1861) 30
L. C. 486.

(g) *Swindell v. Bulkeley*, (1886) 27

(h) *Sterndale v. Hankinson*, (1827)
1 Sim. 393.

(i) *Re Greaves*, (1881) 18 C. D. 551

The stat. 21 Jac. I. c. 16 provides that all actions (*inter alia*) for account and of debt on simple contract shall be commenced within six years after the cause of action.

Statute 21 Jac. I. c. 26 as to simple contract debts.

Suits in equity are not within the words of this statute, it only applied to what were called common law actions, but being within the spirit and meaning of it, upon all legal demands, Courts of Equity were bound to yield obedience to its provisions, and as Courts of Equity will not entertain stale demands, they thought proper to adopt the limit of six years in analogy to the statute (*k*). But now that bills in equity have been abolished, the statute is binding upon the High Court in every case in which it applies (*l*).

The stat. 21 Jac. I. c. 16 contained no provision as to acknowledgment or part payment of principal or payment of interest. But there has been grafted on this statute a series of judicial decisions as to the effect of acknowledgments and payments to take the case out of the statute. Under those decisions part payment of principal and payment of interest stand upon the same footing. Payment of interest is regarded as an acknowledgment of the debt, and from the acknowledgment a promise to pay the debt may and ought to be implied. Moreover, the acknowledgment was held to be sufficient evidence of a new and continuing contract (*m*).

Acknowledgment by part payment.

Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1) provides that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient to take any case out of the operation of the stat. 21 Jac. I. c. 16, unless in writing signed by the party chargeable thereby; and that where there should be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the Act so as to be chargeable by reason of the written acknowledgment or promise signed by

By writing under Lord Tenterden's Act.

Effect of acknowledgment by one of two executors or administrators.

(*k*) Williams (10th ed.) 1655; *Sterndale v. Hankinson*, *ubi. sup.*, at p. 398.

(*l*) *Re Greaves*, *ubi. sup.*, at p. 554.

(*m*) See *Re Hollingshead*, (1888) 37 C. D. 651, 657, per Chitty, J.

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any other of them, provided that nothing therein contained should alter the effect of any payment of any principal or interest made by any person whatsoever; and in an action against joint contractors or executors or administrators, the plaintiff, though barred by the Act as to one or more of such joint contractors or executors or administrators, shall be entitled to recover against any other of the defendants by virtue of the new acknowledgment or promise.

A statement by an executor in an affidavit for probate is a sufficient acknowledgment of a debt within the meaning of Lord Tenterden's Act (n).

Effect of payment of interest by one of two executors or administrators.

The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor or administrator, that is, out of the assets of the testator or intestate. The effect is to keep the debt alive as against the assets. This is in accordance with the general rule that one of several executors or administrators though he cannot by his contract impose any personal liability on his colleagues, may dispose of the assets so as to bind them (o).

Personal liability not involved by acknowledgment.

An executor or administrator is not to be made liable for a devastavit by reason of his having parted with assets simply because his co-executor or co-administrator has given an acknowledgment or promise, or made a payment within the statute. Moreover, the executor or administrator who has given the acknowledgment or promise or made the payment, is not thereby involved in any personal liability (p).

Payment or acknowledgment must be made to creditor or his agent,

A payment or acknowledgment must be made to the creditor or his agent, or to someone who was entitled to receive payment of the debt, and to whom a promise to pay the debt could be presumed. There may be an exception to this rule in the case of a payment to a person believed to fill, though not in fact filling, a representative capacity, as where payment

(n) *Smith v. Poole*, (1841) 12 Sim. 17; *Edwards v. Jones*, (1855) 1 K. & J. 534; *Re Emmett*, (1906) W. N. 201.
(o) *Re Hollingshead*, (1888) 37 C.

D. 651, 658; *Re Macdonald*, [1897] 2 Ch. 181.

(p) *Ibid.*

was made to a person who subsequently took out administration and with the intention that it should enure for the benefit of the estate of the intestate. In such case the administration would have relation back, in order not to lose the benefit of the contract (*q*).

but payment to person to whom grant of administration is subsequently made may be sufficient.

By 3 & 4 Will. IV. c. 42, s. 8, actions of covenant or debt upon bond or other specialty must be commenced within twenty years after the cause of action, or (s. 5) within twenty years after any acknowledgment shall have been made either by writing signed by the party liable or his agent, or by part payment or part satisfaction on account of any principal or interest.

Statute 3 & 4 Will. IV. c. 42, s. 8, as to specialty debts.

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 14), in reference to the Acts of 21 Jac. I. c. 16 and 3 & 4 Will. IV. c. 42, s. 8, provides that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly or severally, or executors or administrators of any contractor, no such contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them so as to be chargeable by reason only of any payment of any principal, interest or other money by any other of such contractors or co-debtors, executors or administrators.

Effect of Mercantile Law Amendment Act, 1856.

Sect. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which is substituted for s. 40 of 3 & 4 Will. IV. c. 27, provides that "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the

Statute 37 & 38 Vict. c. 57, as to money charged upon or payable out of land, or any legacy.

(*q*) *Clark v. Hooper*, (1834) 10 Bing. 480; *Bodger v. Arch*, (1854) 24 L. J. Ex. 19; and see *Stamford, Spalding &*

Boston Banking Co. v. Smith, [1892] 1 Q. B. 765, 769.

right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

(1) *As to Money charged upon or payable out of Land.*

Effect of
37 & 38 Vict.
c. 57, s. 8,
where
specialty is
charged on
land.

Sect. 8 of the Real Property Limitation Act, 1874, reduced the period for recovering money charged on land from the twenty years given by 3 & 4 Will. IV. c. 27, s. 40, to twelve years, but left the twenty years for recovering specialties given by 3 & 4 Will. IV. c. 42, s. 8, untouched, and it was decided by *Sutton v. Sutton* (r) and *Fearnside v. Flint* (s) that where the money was in fact secured by a charge on land, the personal remedy on the covenant or collateral bond was limited in like manner, with the result that the statute applicable to such cases is now the Act of 1874 and not the Act of 3 & 4 Will. IV. c. 42.

As regards
joint liability.

The Mercantile Law Amendment Act, 1856, s. 14 (t), is confined to certain specified Acts which do not include either the Real Property Limitation Act, 1888 (3 & 4 Will. IV. c. 27), or the Real Property Limitation Act, 1874, consequently the debtor in such cases, as from the year 1874, has been deprived of the protection given him by the Act of 1856 (u).

In *Re Lacey* (x) the question arose whether payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator with a covenant for payment of principal and interest, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other part of the real estate which was not subject to the mortgage, and thus entitle the

(r) (1882) 22 C. D. 511.

(s) *Ibid.*, 579.

(t) *Ante*, p. 397.

(u) *Re Lacey*, [1907] 1 Ch. 330,

349, per *Fr. well*, L.J., and see *ante*, p. 397.

(x) [1907] 1 Ch. 330; and see *ante*, p. 354.

mortgagee to an order for administration of the whole of the testator's real estate. It was held on the principles laid down in *Roddam v. Morley* (y) that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty—that payment having been made by a party interested by reason of his liability with others in keeping down the debt, his act of payment binds those others because they are relieved to the extent of such payment from the liability which is imposed on them all, and since the question arose under s. 8 of the Real Property Limitation Act, 1874, to which the Mercantile Law Amendment Act, 1856, has no application, the right of action was kept alive against the other specific devisees.

In *Re Chant* (z) the reasoning on which *Roddam v. Morley* was founded was applied to simple contract debts, but in *Re Lacey* (a) Farwell, L.J., intimated that he failed to see why the Mercantile Law Amendment Act, 1856, should not have applied, if it had been cited, which it was not.

Sect. 25 of 3 & 4 Will. IV. c. 27, and s. 10 of 37 & 38 Vict. c. 57, provide in favour of a purchaser for valuable consideration that time shall begin to run as from the date of the conveyance as against any person claiming under an express trust or claiming to recover any sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, but these sections did not protect the trustee against a claim on the part of the *cestui que trust*. Effect of an express trust.

Sect. 25 (2) of the Judicature Act, 1873, expressly provides that "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

In order to bring a case within s. 25 of 3 & 4 Will. IV. c. 27, and s. 10 of 37 & 38 Vict. c. 57, the land must be vested

(y) (1857) 1 De G. & J. 1.

(z) [1903] 2 Ch. 225.

(a) *ubi sup.*

in a trustee upon an express trust and then the right of the *cestui que trust* to bring an action is saved. The trust must, however, arise upon the construction of the written instrument, not upon any inferences of law imposing a trust upon the conscience. A devise of land to A. paying a sum of money to B., or a devise to A. on condition of paying, is a charge and not a trust (b).

Trust for
payment of
testator's
debts.

Where real estate is devised in trust for the payment of debts, in aid of the personal estate, the statute does not run in equity after the death of the testator (c). On the other hand, as a general principle it may be taken that a charge of debts upon personal estate, where it merely directs that to be done which must have been done if no direction had been given, is simply inoperative (d).

Distinction
between a
charge by
testator of
his own debts
and of debts
of another
person.

Where a testator by his Will charges his real estate with his own debts it is thereby made liable to the payment of them, but the question what constitutes debts is not affected by the charge. If the debt has been paid before the testator's death, the charge does not revive . .

But as regards the debts of another person the payment of which the testator may have charged on his own real estate, the testator was never liable for them, and so far as he was concerned the statute did not operate in his favour and has no operation. Consequently, where the testator charged his real estate with his father's debts, the question is what could be recovered from the father at the father's death (e).

For purposes
of 3 & 4
Will. IV. c. 27
administrator
deemed to
claim as
though no
interval of
time between
death and
grant.

Sect. 6 of 3 & 4 Will. IV. c. 27, which is an Act for the limitation of actions relating to real property, provides "that for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of

(b) *Cunningham v. Foot*, (1878) 3 App. Cas. 974, 990.

(c) *Hughes v. Wynne*, (1823) 1 T. & R. 307.

(d) *Scott v. Jones*, (1838) 4 Cl. & F. 382; *O'Connor v. Haslam*, (1855) 1 H. L. C. 170, 177, per Lord Cranworth.

(e) *O'Connor v. Haslam*, *ubi sup.*

such deceased person and the grant of the letters of administration." So that time begins to run as against an administrator claiming a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration (*f*). The same rule would seem to apply since the Land Transfer Act, 1897, to an administrator claiming real estate. And where a legacy charged on land was bequeathed to an infant who survived the testator and died, it was held that if ever administration were taken out to the infant's estate, time would run as from the death of the infant, since the Act applied to cases arising under s. 40 (for which s. 8 of the Act of 1874 is now substituted), as well as to cases arising under the earlier part of the Act (*g*).

By s. 42 of 3 & 4 Will. IV. c. 27, only six years of arrears of rent or of interest in respect of any sum charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears, can be recovered unless in the meantime there is an acknowledgment in writing given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent.

Statute 3 & 4 Will. IV. c. 27, as to arrears of interest.

Where a testator died prior to the commencement of the Land Transfer Act, 1897, it has been held that an acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mortgage created by their testator cannot be treated as the valid act of the two in their capacity of trustees, and is not a good acknowledgment within s. 42 of the Real Property Limitation Act, 1888 (*h*), and it may be questioned whether, having regard to s. 2 (2) of the Land Transfer Act, 1897, one only of several joint personal representatives can give an acknowledgment effectually to bind real estate vested in them jointly under the Act.

Doubtful whether acknowledgment by one of several personal representatives will bind real estate.

A Court of Equity is not under any obligation to follow, as regards personal estate, the analogy of a statute which applies

Analogy of statute as to charge on land inapplicable to personal estate.

(*f*) *Re Williams*, (1886) 34 C. D. 558. (1884) 34 C. D. 560, note.

(*g*) *Re Bonsor & Smith's Contract*, 111. (A) *Astbury v. Astbury*, [1898] 2 Ch.

to real estate (f). Sect. 42 of 3 & 4 Will. IV. c. 27, has no application in the case of personalty, and in the case of a lien on personal property which is the subject-matter of a sale not only does that statute not apply, but there is no Statute of Limitations which has any application at all, and interest at 4 per cent. per annum is recoverable for the whole period from the date on which the debt was incurred (k).

Where a fund in Court is applicable for the payment of a mortgage debt, on an application for payment out the mortgagee is in the same position as if an action for redemption had been brought, and notwithstanding s. 42 of 3 & 4 Will. IV. c. 27 he is entitled to receive full arrears of interest (l), provided his title is not extinguished under s. 84 (m).

(2) *As to Legacies not charged on Land and Personal Estate of an Intestate.*

When legacy ceases to be such.

A legacy does not cease to be a legacy within the meaning of s. 8 of the Real Property Limitation Act, 1874, merely because it is subject to some implied trust. The Judicature Act, 1878, s. 25 (2) (n), excepts only express trusts (o). A trust legacy, however, ceases to be a legacy within the meaning of the Act of 1874 when it is severed by the executor from the general estate (p).

Interest on legacies.

Where all questions as to the Statutes of Limitations are out of the way, legatees who have waited for the payment of their legacies until after the falling in of a reversionary interest are entitled to all arrears of interest from the expiration of one year after the death of the testator (q).

Action against administrator to recover personal estate of intestate.

The stat. 28 & 24 Vict. c. 88, s. 18, provides that "After the 31st day of December, 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed

(f) *Smith v. Hill*, (1878) 9 C. D. 143; *Mellersh v. Brown*, (1890) 45 C. D. 325, 329, and see *Re Haseldine's Trusts*, [1907] 1 Ch. 686.
(k) *Re Stucley*, [1906] 1 Ch. 67.
(l) *Re Lloyd*, [1903] 1 Ch. 385.
(m) *Re Haseldine's Trusts*, [1906]

1 Ch. 34.

(n) *Ante*, p. 399.

(o) *Re Davis*, [1891] 3 Ch. 119.

(p) See *Williams* (10th ed.) 1659.

(q) *Re Blachford*, (1884) 27 C. D. 676.

by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same (r) shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given."

The next-of-kin have no present right to receive from the administrator a reversionary asset belonging to the intestate before it falls into possession and is possessed by him, nor where he is compelled to take proceedings to recover an outstanding asset, before he recovers it or obtains possession of it (s).

When next-of-kin has present right to receive a reversionary or outstanding asset.

Legatees are barred by s. 8 of 37 & 38 Vict. c. 57, after twelve years, but persons claiming under an intestacy are not affected by that Act, and under the Act of 23 & 24 Vict. c. 38, they are only barred after twenty years (t), whether the intestacy is partial or entire (u).

(8) *As to Claims founded upon a Devastavit.*

A claim founded upon a devastavit in distributing the personal estate is barred after six years (v).

Claim upon devastavit.

Where the action must be framed, and the plaintiff must rely on a devastavit, and six years have elapsed, the Statute of Limitations applies (x). But personal representatives cannot

Executor or administrator cannot set up statute-barred devastavit as defence to legal claim.

(r) As to what is a "present right to receive" within this section see *Re Pardoe*, [1906] 1 Ch. 265, but it is submitted, having regard to *Hornsey Local Board v. Monarch Investment Building Society*, (1889) 24 Q. B. D. 1, *Re Owen*, [1894] 3 Ch. 220, and *Waddell v. Harband* [1905] 1 I. R. 416, this case was wrongly decided.

Re Johnson, (1885) 29 C. D. 964, 971.

(s) *Williams* (10th ed.) 1658.

(t) *Willis v. Earl Howe*, (1880) 43 L. T. 375.

(v) *Thorne v. Kerr*, (1855) 2 K. & J. 54; *Re Gale*, (1883) 22 C. D. 820.

(x) *Leons v. Warmoll*, [1907] 2 K. B. 350, 361.

set up wrongful payments by way of *devastavit* as a defence in order to claim the benefit of the Statute of Limitations. For instance, executors having distributed the personal estate among simple contract creditors and beneficiaries, with knowledge of a mortgage debt unsatisfied, the mortgaged property subsequently becoming insufficient, and interest falling into arrear, the executors are liable to account to the mortgagees for the personal estate misapplied (y).

Analogy of statute 21 Jac. I. c. 16 inapplicable to breach of trust.

Effect of Trustee Act, 1888, s. 8.

The analogy of the statute of 21 Jac. I. c. 16 does not apply to a liability for a breach of trust. The trustee himself cannot set up the statute, and his personal representative or heir or devisee is in no better position (z).

The Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, provides as follows: (1) "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a) "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(b) "If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall

(y) *Re Marsden*, (1884) 26 U. D. 783; *Re Hyatt*, (1888) 38 C. D. 609, and see *Lacons v. Warmoll*, *ubi sup.* at p. 367, per Buckley, L.J.

(z) *Brittlebank v. Goodman*, (1868) L. R. 5 Eq. 545, 553; *Woodhouse v. Woodhouse*, (1869) L. R. 8 Eq. 514.

run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation; but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(3) "This section . . . shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations."

By s. 1 (3) for the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator(a).

CANADIAN NOTES.

Where a cause of action accrues in the lifetime of the debtor, the statute begins to run against him, and continues to run against his estate notwithstanding there is no executor or administrator; but where the cause of action does not accrue until after his death then the time does not begin to run until there is a personal representative who can sue and be sued. *Grant v. McDonald* (1860), 8 Gr. 468.

The Statute of Limitations does not bar the claim of an executor against the estate of his testator. *Emes v. Emes* (1865), 11 Gr. 325. See *Crooks v. Crooks*, 4 Gr. 615. Claim of executor.

An acknowledgment of indebtedness by letter written after the creditor's decease to the person who is entitled to take out letters of administration to the creditor's estate, and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations. *Robertson v. Burrill* (1895), 22 A.R. 356.

As against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Gr. 385.

(a) See *post*, p. 581, as to the effect of this Act.

Under R.S.N.S., c. 177, s. 2, relating to actions against executors for injuries done by deceased, although the action is brought in the lifetime of the deceased, if he dies before judgment there can be no recovery against the estate, if six months have elapsed before the acts complained of and his death. *McDonald v. Dickson* (1905), 40 N.S.R. 560.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties and of which they have received no notice. The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations. *Uffner v. Lewis* (1899), 27 A.R. 242.

Breaches
of trust.

The Statute of Limitations is a bar to a recovery against executors in respect to any breaches of trust which occurred more than six years before the action was brought. R.S.O. 1897, c. 129, s. 32.

A claim was made in certain administration proceedings on promissory notes which had been assigned to the claimant by H., under an agreement which, however, was held void for champerty and the claimant re-delivered the notes to H. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H., but not before the date of the administration order, nor before the claimant tried to prove on them in the administration proceedings. It was held that the order for administration prevented the bar of the Statute of Limitations. *Re Cannon, Oates v. Cannon* (1880), 13 O.R. 70.

The father of the plaintiff obtained judgment against L. and R. on October 26th, 1868, and the plaintiff began an action against L. and R. upon the judgment on October 22nd, 1888. At that time the plaintiff's father was dead and no personal representative of his estate had been appointed. On November 4th, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing

probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. set up the Statute of Limitations and it was held that the widow was the person primarily entitled to administer, and, as she had not renounced when the action was begun, the plaintiff had, at that time, no status and that the action failed because of the Statute of Limitations. *Chard v. Ras* (1889), 18 O.R. 371.

There is no reason why the Statute of Limitations should not be applied to the claim of a wife against her husband in the same way as if she were not his wife. *Re Starr, Starr v. Starr* (1902), 2 O.L.R. 762. Claim of wife.

The claim of one of the *cestuis que trust* who was entitled to a life interest in, and who had received the income from the wrongful holder of part of the estate was held barred by the Statute of Limitations as against the executors, she not having received anything from them for six years. *Stewart v. Snyder* (1899), 30 O.R. 110.

Land was conveyed by a deed which, although absolute in form, was intended to operate by way of mortgage, as security for a debt due from the grantor to the grantee, and the grantee by his last will, made seventeen years after the date of the deed, directed that the land should not be sold during the lifetime of the wife of the grantor, and that if at any time before the death of the said wife, the grantor should repay the amount of his indebtedness then the property should be reconveyed. The grantee died twenty-nine years after the date of the deed and his wife died two years after him, having continued in possession of the land down to the time of her death. Notwithstanding the clause in the will restraining the executors from selling the land, an action brought by the executors, after the death of the wife, to recover possession of the land was held barred by the Statute of Limitations. *Whitman v. Hiltz* (1906), 39 N.S.R. 230.

CHAPTER XXXII.

OF LEGACIES.

SECT. 1.—What is a *Legacy*.

Definition of
"legacy."

A LEGACY is a bequest or gift of goods and chattels by Will or testament; the person to whom it is given is styled the legatee; and if the gift is of the residue of an estate after payment of debts and legacies he is then styled the residuary legatee(a).

Formerly
"legacy" and
"devise" and
sometimes
used synony-
mously.

In some old reports and text-books the terms legacy and devise are used as synonymous. The definitions given in *Termes de la Ley* (1721) are as follows:—"Legacy (Legatum) is a term of the Civil Law, and it is that which we in our law call a devise, viz., lands or goods given unto any man by the Will or testament of another." "Devise is, where a man in his testament gives or bequeaths his goods or lands to another after his decease."

Now "legacy"
used as apply-
ing to per-
sonal estate.

But at the present day, although words used by a testator may be construed as referring to real estate, yet independently of context "legacy" or "legatee" or "residuary legatee" cannot be understood as applying to anything but personal estate(b).

Forgiveness
of debt.

Words of remission or forgiveness of a debt amount to a specific legacy which is subject to payment of duty as such(c), and to the usual rules of administration which affect all legacies(d).

Direction to
charge for
services.

A direction in a Will authorising a professional man to charge for services for which otherwise he would have no right

(a) *Tomlins' Law Dictionary*
(4th ed.) (1835) "Legacy."
(b) *Windus v. Windus*, (1856) 6
De G. M. & G. 549.

(c) *Att.-Gen. v. Holbrook*, (1829)
12 Price, 407.
(d) *Re Wedmore*, [1907] 2 Ch.
277.

to charge operates by way of bounty or legacy (e), and it would seem liable to legacy duty (f).

But a direction for payment of duty chargeable upon any legacy, so that the legacy shall be free of duty, notwithstanding the same may be deemed a legacy is not chargeable with duty as a legacy (g).

Direction for payment of duty on a legacy.

There may be a valid trust legacy, or direction to executors to apply a sum of money for a particular purpose without there being any person capable, as against the executor, of enforcing it; as, for instance, a legacy to be applied in erecting a monument to the memory of the testator on consecrated or unconsecrated ground, or for the repair of such a monument; or as a provision for the testator's horses and dogs. Such a legacy is not a charity, and provided it is to come to an end within the limits fixed by the rule against perpetuities, it is perfectly valid (h).

Trust legacies other than for persons.

In the absence of any other direction contained in the Will, pecuniary legacies are payable solely out of the personal estate. Where a testator bequeaths legacies and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds; but they are primarily payable out of the personalty. Where, however, there is a direction to pay legacies out of a mixed fund—where real and personal estate is given upon trust for sale, and the legacies are directed to be paid out of the proceeds, or without a direction for an absolute conversion, an intention is shown of creating a mixed fund for their payment—the legacies are payable *pro rata* out of the real and personal estate in the event of the ultimate residue being undisposed of (i).

Legacies payable out of personal estate unless directed to be paid out of mixed fund, then *pro rata*.

(e) *Re White*, [1898] 1 Ch. 297; [1898] 2 Ch. 217.

(f) Cf. *Re Thorley*, [1891] 2 Ch. 613, and see per Kekewich, J., in *Re White*, *ubi sup.*, at p. 299.

(g) 36 Geo. III. c. 52, s. 21. As to what shall be deemed a legacy within the intent of the Act, see s. 7, and

Williams (10th ed.) 1770.

(h) *Re Dean*, (1889) 41 C. D. 552, 557.

(i) *Allan v. Gott*, (1872) L. R. 7 Ch. 439; *Re Boards*, [1895] 1 Ch. 499; *Re Spencer Cooper*, [1906] 1 Ch. 130.

SECT. 2.—*Distinction between General, Specific, Demonstrative, and Pecuniary Legacies.*

General
legacy.

Specific
legacy.

A legacy is "general" when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. A legacy is "specific" when it is a bequest of a specified part of the testator's personal estate which is so distinguished. Thus, for example, "I give a diamond ring" is a general legacy which may be fulfilled by the delivery of any ring of that kind; while "I give the diamond ring presented to me by A." is a specific legacy, which can only be satisfied by the delivery of the identical subject (*k*). A specific bequest was defined by Jessel, M.R., in *Bothamley v. Sherson* (*l*), as being part of the testator's property itself and a part as distinguished from the whole of the residue. A bequest of all the testator's goods and chattels in a particular place or country, he having property elsewhere, is specific (*m*). So it has been held that a testator may, as between the beneficiaries claiming under his Will, specifically devise his share in freeholds which form part of partnership assets by giving it in a different direction to his general share in the business, and in giving effect to the testator's intention, the business being solvent, the liability to contribute to the partnership debts will be thrown on the testator's general share so as to free the specific legacy (*n*).

Effect of s. 24
of Wills Act.

Sect. 24 of the Wills Act in effect provides that descriptions of real or personal property the subject of gift, *primâ facie* refer to and comprise the property answering to the description at the death of the testator. The application of this principle of construction to specific bequests is often attended with considerable difficulty. If, however, according to the true construction of the Will, the subject-matter of the bequest is not a specific sum, security, or investment, but is described in such a manner as to be generic—that is, to provide a genus, or class of objects—it may from its very nature be

(*k*) Williams (10th ed.) 911, 912.

(*l*) (1875) L. R. 20 Eq. 304.

(*m*) See Williams (10th ed.) 92.

(*n*) *Re Holland*, [1907] 2 Ch. 88.

susceptible of increase or diminution during the testator's life; for instance, a bequest by a testator of his Midland Railway stock or of his shares in any particular company (*o*). In such cases the Wills Act requires something more on the face of the Will for the purpose of indicating a contrary intention than the mere circumstance that the subject of the bequest is designated by the pronoun "my" (*p*).

Specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death; consequently from that period, whatever produce accrues upon them belongs to the legatee. Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator (*q*). So, also, bonuses which accrue after the death of the testator (*r*).

Accretions to specific legacy.

When a specific legacy is given on the happening of a contingency the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to the residuary legatee, or next-of-kin, as the case may be. But when a specific legacy is vested at once in the legatee, and the enjoyment only is postponed, until the happening of the contingency the interim interest and accretions go to the legatee (*s*).

Distinction between contingent and vested specific legacies as to accretions.

It is the duty of executors, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish: and unless compelled they ought not to apply them to the payment of debts (*t*).

Duty of executors to preserve specific legacies.

It is also the duty of executors to get in all the testator's estate, whether specifically bequeathed or otherwise; and the expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration (*u*).

Cost of recovering specific legacies.

If personal chattels are bequeathed to A. for life, remainder

Chattels given in succession.

(*o*) See *Re Slater*, [1906] 2 Ch. 480, 484; [1907] 1 Ch. 665, 670.

(*p*) Per Wood, V.-C. in *Goodlad v. Burnett*, (1854) 1 K. & J. 341, 347. For cases where the larger or narrower interpretation prevailed, see *Williams* (10th ed.) 1178, n. (*f*).

(*q*) *Williams* (10th ed.) 1162.

(*r*) See *Maclaren v. Stainton*, (1859) 27 Beav. 460, 462.

(*s*) *Guthrie v. Walrond*, (1883) 22 C. D. 573, 578.

(*t*) *Clarke v. Ormond*, (1821) Jacob, 108.

(*u*) *Perry v. Medderscroft*, (1841) 4 Beav. 197, 204.

to B., A. will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder. Security is not now required, unless a case of danger is shown (x).

Of things *quæ ipso usu consumuntur*.

Specific legacies not liable to abate with general legacies.

On ademption legatee not entitled to compensation.

Demonstrative legacy, nature of.

A gift for life of things *quæ ipso usu consumuntur*, as corn and wine, if specific, is an absolute gift of the property (y).

On a deficiency of assets, a specific legacy is not liable to abate with general legacies; on the other hand, if the specific legacy fail by ademption or inadequacy of its subject, the legatee is not entitled to any recompense out of the general personal estate (z).

A legacy of quantity is ordinarily a general legacy: but there may be legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called a demonstrative legacy. It is so far general that if the fund fail, the legatee will not be deprived of his legacy, but will be permitted to receive it out of the general personal estate; yet it is so far specific that *quoad* the fund it will not be liable to abate with general legacies upon a deficiency of assets (a).

Under some circumstances even pecuniary legacies may be specific, as of a certain sum of money in a certain bag or chest; or in the hands of A.; or of £200, the balance due to the testator from his partner on the last settlement between them, if the testator did not draw such money out of the trade before he died (b).

Where sums of money are bequeathed by a testator who has property in England and elsewhere, to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific (c).

(x) Williams (10th ed.) 1127, and see *Conduitt v. Soane*, (1844) 1 Coll. 285.

(y) Williams (10th ed.) 1127.

(z) *Ibid.*, 912.

(a) *Ibid.*, 913.

(b) *Ibid.*, 914, and see *Re Grainger*, [1900] 2 Ch. 756.

(c) Williams (10th ed.) 914.

When pecuniary legacy may be specific.

So a debt due to the testator may be specifically bequeathed, but where a legacy is bequeathed out of a debt it will be a demonstrative legacy (*d*).

Again, where a legacy of money is given out of a particular stock, of which the testator was possessed at the date of the Will, without anything expressive of the testator's intention, as where the bequest is of "£1,000 out of my reduced bank annuities three per cents.," the legacy will not be specific but a demonstrative legacy. But if the legacy given had been "of my stock," or "in my stock," or "part of my stock," it would have been a specific gift of an aliquot part of the stock (*e*). So a legacy of "£800 invested in Consols" is *prima facie* specific (*f*).

There may be a specific bequest of stock, of which a testator is not possessed at the making of his Will but of which he may be possessed at his death (*g*). The Wills Act brings down the specific bequest to the date of the testator's death (*h*).

Specific thing
need not exist
at date of
Will.

Every devise of land is specific; and a residuary devise remains specific notwithstanding s. 24 of the Wills Act, which makes the Will speak as if it had been executed immediately before the death of the testator (*i*).

Every devise
of land is
specific.

General legacies do not become specific because they are charged upon, or payable out of, the proceeds of real estate (*k*). But a testator in directing payment to persons of sums out of the proceeds of real estate may show an intention that these persons should take as specific legatees an aliquot part of such proceeds (*l*). So if a testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment (*m*).

General
legacies
charged upon
or payable
out of pro-
ceeds of sale
of land.

(*d*) Williams (10th ed.) 921; Campbell v. Graham, (1830) 1 R. & M. 453.

(*e*) Williams (10th ed.) 918; Kirby v. Potter, (1799) 4 Ves. 748, 750.

(*f*) *Re Pratt*, [1894] 1 Ch. 491.

(*g*) Williams (10th ed.) 919.

(*h*) Bothamley v. Sherson, (1875) L. R. 20 Eq. 304.

(*i*) *Hensman v. Fryer*, (1867) L. R. 3 Ch. 420; *Lancefield v. Iggulden*, (1874) L. R. 10 Ch. 136.

(*k*) Williams (10th ed.) 922.

(*l*) *Page v. Leapingwell*, (1812) 18 Ves. 463, and see *post*, p. 512.

(*m*) *Dickin v. Edwards*, (1844) 4 Hare, 273, 276.

Specific interest in real or personal estate not affected by a general charge thereon of legacies.

Effect on general residuary clause by exception of specific parts or enumeration of some particulars.

If a specific interest is given in a real or personal estate, it will not be affected by a general charge of legacies; for where there is a specific legacy or devise, the presumption is that it is the intention of the testator that the legatee or devisee shall have it in its integrity and a general charge, which in terms may comprehend the specific bequest or devise, is not sufficient of itself to show an intention to take it away (n).

The fact that a specific legacy is given, or a specific part of the personalty excepted, out of a general residue, does not make a gift of that general residue specific (o).

Nor is a general residuary clause the less general because it contains an enumeration of some of the particulars of which it may consist (p).

SECT. 8.—Of Cumulative Legacies.

Whether or not a second legacy to a legatee is to be regarded as a mere repetition of the first bequest or as an additional and cumulative benefit seems to be governed by the following rules of construction (q):—

Where there is no internal evidence of intention.

Same specific thing given twice.

1st. Where there is no internal evidence of intention, the following propositions of law appear to be established:—

I. If the same specific thing is bequeathed twice to the same legatee in the same Will, or in the Will and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once.

Two legacies of quantity of equal amount in same instrument.

II. Where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only (r).

Two legacies of quantity of unequal amount in same instrument.

III. Where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is

(n) *Conron v. Conron*, (1858) 7 H. L. C. 168.

(o) *Re Ovey*, (1882) 20 C. D. 676; S. C. *sub nom.* *Robertson v. Broadbent*, (1883) 8 App. Cas. 812.

(p) *Williams* (10th ed.) 925, and see *Theobald on Wills* (7th ed.) 226 as to when, after enumerating particulars,

general words may be restricted to things *ejusdem generis*.

(q) *Williams* (10th ed.) 1035 *et seq.*; *Hooley v. Hatton*, (1773) 1 Bro. C. C. 390, n., referred to in *Wilson v. O'Leary*, (1871) L. R. 12 Eq. 525, 531.

(r) See also *Hubbard v. Alexander*, (1876) 3 C. D. 738.

not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both (*s*).

IV. Lastly, where two legacies are given *simpliciter* to the same legatee by different instruments, in that case, also, the presumption is, that the latter is cumulative, whether its amount be equal or unequal to the former (*t*).

Two legacies given by different instruments.

2ndly. Where there is internal evidence of the intention of the testator.

Where there is internal evidence of intention.

In these cases it becomes a question of construction. A codicil is professedly an addition to the Will (*u*), but a codicil may be a mere copy of another and intended as a substitution (*x*). Where there are two instruments, and the testator calls both his last Will, and they are both admitted to probate, still the general scope of both must be looked at to see if substitution is intended (*y*).

If in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both the instruments the same motive is expressed, and the same sum is given, the Court considers the two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. The Court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments. It will not raise it if in either instrument there be no motive, or a different expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different (*z*).

Two legacies in different instruments of equal amount, with same motive expressed.

Two legacies in different instrument of unequal amount with same motive expressed.

Where Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, they will receive evidence to repel that presumption, so that where

Evidence admissible to prove testator intended double gift.

(*s*) See also *Curry v. Pile*, (1787) 2 Bro. C. C. 225.

(*t*) See also *Wilson v. O'Leary*, (1872) L. R. 7 Ch. 448, 454.

(*u*) *Cresswell v. Cresswell*, (1868) L. R. 6 Eq. 69.

(*x*) *Chichester v. Quatrefages*,

[1895] P. 186.

(*y*) *Tuckey v. Henderson*, (1863) 33 Beav. 174; In the *Estate of Bryan*, [1907] P. 125, 128.

(*z*) *Hurst v. Beach*, (1819) 5 Madd. 351, 358.

the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed (a).

SECT. 4.—Of Substituted and Added Legacies.

Legacy given
in substitution
subject to same
incidents,

As a general rule where one legacy is given as a mere substitution for another, the substituted gift is subject to the incidents of the original one, although it is not so expressed in the testamentary instrument (b).

also added
legacies.

So added legacies shall, generally speaking, be subject to the same conditions and incidents as those to which they are added (c).

Restriction on
the rule.

But although this is the general rule, the Courts do not follow it where its effect would be to introduce such limitations as would convert a gift in its terms absolute into one of a life estate only, and speaking generally, it would seem there is no substantial authority for applying the rule to any case but the simple one where the alteration is intended to apply to the amount of the legacy only (d).

With regard to added legacies, if the testator directs that the legacies in the body of his Will shall be free of legacy duty, and at a later date adds a codicil giving pecuniary legacies *simpliciter*, without any provision as to payment of legacy duty, there would seem to be no presumption that if one of the legatees under the codicil happens to be a legatee under the Will his legacy under the codicil is to be paid free of legacy duty while the others are not (e).

(a) *Hurst v. Beach*, (1819) 5 Madd. 311, 358.

(b) Williams (10th ed.) 1040; and see *Re Boddington*, (1884) 25 C. D. 685, 689, per Ld. Selborne.

(c) Williams (10th ed.) 1041.

(d) *Re Boden*, [1907] 1 Ch. 132, 149, per Fletcher Moulton, L.J.; *Re Joseph*, [1908] W. N. 159, C. A., reversing (1908) 1 Ch. 599.

(e) *Ibid.*

CANADIAN NOTES.

Pecuniary legacies not charged on land are primarily payable out of personal estate unless directed to be paid out of a mixed fund, in which case they are payable *pro rata* as set forth in the text. *Toomey v. Tracey* (1883), 4 O.R. 708; *Re Gilchrist* (1876), 23 Gr. 524; *Callaghan v. Howell* (1897), 29 O.R. 329; *Ells v. Ells* (1871), 1 N.S.R. 173; *Davidson v. Boomer* (1871), 18 Gr. 475; *Johnson v. Denman* (1889), 18 O.R. 66; *Totten v. Totten* (1890), 20 O.R. 505; *Re Piers* (1877), 11 N.S.R. 358; *In re Bailey* (1904), 6 O.L.R. 688. But there may be an implied charge of legacies upon real estate. *Stewart v. Dick* (1884), 10 P.R. 411. *Clark v. Clark* (1870), 17 Gr. 17. *Robson v. Jardine* (1873), 22 Gr. 420; *Hellem v. Severs* (1876), 24 Gr. 320; *Confederation Life v. Moore* (1889), 6 Man. R. 162; *Mauson v. Ross*, 1 B.C.R., Part II., 49; *Gray v. Richmond*, 22 O.R. 256.

A specific bequest is exempt from contribution towards payment of pecuniary legacies. *Augustine v. Schrier* (1889), 18 O.R. 192; *Rudd v. Harper* (1888), 16 O.R. 422.

A direction that a legacy shall be paid out of the annual produce of a farm devised to another, or as the executors should deem best, makes it a charge on the farm notwithstanding the concluding power to executors. *Callaghan v. Howell* (1897), 29 O.R. 329.

For instances of a demonstrative as distinguished from a specific legacy, see *Day v. Harris* (1882), 1 O.R. 147; *Re Logan* (1886), 4 Man. R. 19. Demonstrative legacy.

Legacies paid out of a mixed residue are a charge on the land. *Young v. Purvis* (1886), 11 O.R. 597; *Moore v. Mellich* (1884), 3 O.R. 174.

A bequest to an executor in one clause of a will of the interest in certain funds to compensate him for his trouble and expense in attending to the will, and a bequest to the same

executor in another clause of \$100 per annum for travelling to submit his accounts from time to time are not inconsistent and the executor may take both. *Hellen v. Severs* (1876), 24 Gr. 320.

A legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, and the construction of a particular residuary gift, is not affected by the presence or absence of a general residuary gift. *Ball v. Rector and Churchwardens of the Church of the Ascension* (1883), 5 O.R. 386.

"Estate."

A direction that, in the event of the estate being insufficient to pay certain pecuniary legacies, they shall abate proportionately does not charge them on the residue; the word "estate" meaning in this connection personalty. *Re Fairley* (1895), 1 N.B. Eq. 91. But where a testator directed his debts to be paid out of his "estate," and bequeathed all his personalty to his wife and directed his executors to sell such portions of his "property" as should be necessary to pay debts and to give title," it was held that the personalty was exonerated. *Harrold v. Wallis* (1863), 10 Gr. 197.

Where a testator bequeathed shares in a company, upon which there were calls due for which he might have been sued in his lifetime, the legatee was held entitled to have the calls paid out of the general estate. *Manson v. Ross* (1884), 1 B.C.R., Part II., 49.

A testatrix bequeathed the interest of \$4,500 to her son Robert and provided that "it is my will that my son Robert is to get no benefit from my estate except as provided in this will, the provision herein being made in lieu of any share in the insurance on my life." Two policies of insurance formed part of the estate, and a third, for \$2,000, payable to her three sons (one of them Robert) was in force at the time of her death. Street, J., after stating that mere general words are insufficient to raise a case of election against a legatee or devisee, held that the plaintiff need not elect but was entitled both to the interest on the \$4,500 and his share

of the \$2,000 policy which was not assets of the estate. *King v. Yorston* (1895), 27 O.R. 1. And see *Mutchmor v. Mutchmor* (1904), 8 O.L.R. 271.

Mere misdescription of the legatee will not defeat the legacy. *Reeves v. Reeves* (1908), 12 O.W.R. 124.

Where a legacy payable out of the shares of a company is reduced by a codicil, and the amount of the reduction is given to another, it is payable out of the same shares. *Smith v. Seaton* (1870), 17 Gr. 397.

A provision purporting to defer the enjoyment of insurance moneys beyond the time at which the beneficiary attains the age of 21 is ineffective, notwithstanding the Insurance Act, R.S.O. 1897, ch. 203. *In re Canadian Home Circle, Eliza Smith Case* (1907), 14 O.L.R. 322.

Where a sum intended to be given by a legacy is left blank in the will, the legatee takes nothing. *Brewster v. Foreign Mission Board*, 2 N.B. Eq. 172.

A legacy of a sum of money for life is an absolute gift. *Re Chapman* (1902), 4 O.L.R. 130.

As to what will constitute a specific legacy, see the judgment of Meredith C.J., in *Re Moyer* (1907), 10 O.W.R. 3, where the more exact definition of a specific legacy is quoted.

A bequest of a testator's chattels, in unrestricted terms, will include a mortgage. *Re McMillan* (1902), 4 O.L.R. 415.

Where a testator gave to his daughter one-fourth of a share in his estate, on certain terms, and by a codicil gave her "that share or division of my estate as referred to in a former will, in land," it was held that the devise was substitutional for the bequest. It was also held that the daughter took an estate in fee, and not one subject to the incidents of the original gift in the will. In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift. *Scott v. John* (1882), 4 O.R. 457.

A bequest of "plate, plated goods, books, pictures, together with all accounts, papers, and effects that might be in my possession at the time of my death," is specific and there

being no residuary disposition the residue of personalty is undisposed of. *McKidd v. Brown* (1856), 5 Gr. 633.

"A bequest of an annuity to a widow, and subject thereto a bequest of a blended fund to a legatee, with the provision that if he died under thirty the fund should be distributed accordingly to the Statute of Distributions, entitles the widow to her annuity as well as her share under the Statute of Distributions. *Re Quimby* (1884), 5 O.R. 738."

CHAPTER XXXIII.

OF THE FAILURE OF DEVISES AND BEQUESTS.

SECT. 1.—Of Lapse.

UNLESS the legatee survives the testator the legacy given to him is extinguished (a). Legatee must survive testator.

If a person has not been heard of for seven years there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* is on the person who claims a right to the establishment of which that fact is essential (b).

The cases of *Williamson v. Naylor* (c), *Philips v. Philips* (d), and *In re Sowerby's Trust* (e), have established the rule that, if the Court finds, upon the construction of the Will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse (f). Except where legacy intended in discharge of a moral obligation and not mere bounty.

Although the addition to the name of the legatee of the words "and his executors, administrators and assigns" will not prevent a lapse should the legatee die in the lifetime of the testator, such words being considered words of limitation only (g), yet where there is a bequest to A. "or his personal representatives," or to A. "or his heirs," the word "or" Addition of "and his executors, administrators and assigns" does not prevent lapse, but the word "or" may imply substitution.

(a) Williams (10th ed.) 955.

(b) *Re Phené's Trusts*, (1869) L. R. 5 Ch. 139, 152; *Re Rhodes*, (1887) 36 O. D. 586; *Re Benjamin*, [1902] 1 Ch. 723; *Re Aldersey*, [1905] 2 Ch. 181; and see *ante*, p. 71.

(c) (1838) 3 Y. & Coll. Ex. 208.

(d) (1844) 3 Hare, 281.

(e) (1856) 3 K. & J. 630.

(f) *Stevens v. King*, [1904] 2 Ch. 80.

(g) See *post*, p. 550.

generally speaking, implies a substitution so as to prevent a lapse (*h*).

Substitutionary gift to issue, following a class gift, to be effectual parent must be living at date of Will.

The law was settled in the case of *Christopherson v. Naylor* (*i*) that where there is a gift to a class and then a substitutionary gift to issue of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and, consequently, if the parent was dead at the date of the Will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift (*k*).

Scous, where there is an original substantive gift to the two classes of legatees.

Where, however, there is an original substantive gift to two classes of legatees, first, to the children of a legatee for life, living at the time of his decease; and, secondly, to the issue of such of them as shall be then dead leaving issue, the issue of a child who was dead at the date of the Will may be entitled to a share (*l*).

Gift not to be construed contingent unless context requires it.

A gift is never to be construed as contingent unless the context requires it: consequently, where there is a gift to children as should be living at the death of a tenant for life, but if any should then be dead leaving issue such issue should be entitled to their parent's share, the fact that the gift to the parent was contingent does not affect the gift of the issue, which is an independent gift, and issue of a child dying before the tenant for life would take a vested interest, although such issue should die before the tenant for life (*m*).

Rule as to lapse applies to appointment under testamentary power.

The rule as to lapse in the event of the legatee dying in the lifetime of the testator is equally applicable to an appointment under a testamentary power (*n*).

(*h*) Williams (10th ed.) 959, and see *ante*, p. 245.

(*i*) (1816) 1 Mer. 320.

(*k*) Per Kay, J., in *Re Webster's Estate*, (1883) 23 C. D. 737, and see *Re Wood*, [1894] 3 Ch. 381, 387; *Re Gorrings*, [1906] 1 Ch. 319; [1906] 2 Ch. 341; [1907] A. C. 225; *Re Cope*, [1908] 2 Ch. 1.

(*l*) Williams (10th ed.) 960, referring to *Tytherleigh v. Harbin*, (1835) 6 Sim. 329 and other cases.

(*m*) *Martin v. Holgate*, (1866) L. R. 1 H. L. 175; *Re Woolley*, [1903] 2 Ch. 206.

(*n*) *Oke v. Heath*, (1748) 1 Ves. Sen 135.

Where a legacy is given to two persons as joint tenants, and one of the legatees dies in the lifetime of the testator, the entire legacy goes to the survivor, and consequently there is no lapse.

No lapse in case of joint tenants.

Moreover, there is no lapse by the death of a legatee in the lifetime of the testator where the Will contains an express limitation over to survivors (o). Whether accruing as well as original shares pass under a survivorship clause in a Will depends on whether the testator intended the disposition as of an aggregate fund or of separate legacies (p).

Effect of express gift over to survivors.

If the legatees take as tenants in common, and one of the legatees dies in the lifetime of the testator, his share will lapse unless the legacy is given to them as a class gift, in which case those of the described class who survive the testator take the whole (q).

Lapse in case of tenants in common, unless a class gift.

Primâ facie, a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator. But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made to all my nephews and nieces including A., or to C. and all other my nephews and nieces, or to four named daughters of the testator and all his afterborn daughters, or to the testator's niece A. and the child or children of his sister B. who should attain the age of twenty-one years equally to be divided among them as tenants in common, in all these cases there would be a class gift (r).

What constitutes a class gift.

There may also be a composite class, such as, for instance, children of A. and children of B. On the other hand, a gift to A. and all the children of B. is *primâ facie* not a class gift (s).

Composite class.

Another principle is that all the interests of members of the class must vest in interest at the same time. For instance,

All interests must vest at same time.

(o) *Mackinnon v. Peach*, (1838) 2 Kean, 555; *Williams* (10th ed.) 966.

(p) *Worlidge v. Churchill*, (1792) 3 Bro. C. C. 465; *Williams* (10th ed.) 966.

As to the meaning of "survivor," see *Re Bowman*, (1889) 41 C. D. 525, 531;

King v. Frost, (1890) 15 App. Cas. 548; *Inderwick v. Tatchell*, [1901] 2 Ch. 738.

(q) See *Williams* (10th ed.) 963.

(r) *Kingsbury v. Walter*, [1901] A. C. 187, 192.

(s) *Ibid.*

if there is a gift to A. for life and afterwards to B. and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life.

On the other hand, a gift to A. for life and at his death to be equally divided between his surviving children and the testator's niece Rosamund, is not a class gift since only those children who survived the tenant for life would have taken, whereas Rosamund's interest would have become vested at the testator's death. But if the gift were to A. for life and at his death the property to be equally divided amongst his children and the testator's niece Rosamund, or such of them as shall survive the tenant for life, making them all vested interests at the same time, it would be a class gift (t).

Effect of rule
against per-
petuities in
class gifts.

If a fund is given in trust for a class, some of the members of which may by possibility attain vested interests in it after the period limited by the rule against perpetuities, the gift is void not only as regards them, but also as regards all the members of the class. The principle is that you cannot ascertain the share of any member of the class without taking into account the members born after the expiration of the legal period; the rights of all the members of the class would be affected by the consideration whether or not some of them were born within the legal period. But this reasoning does not apply where the question is not as to the amount of the share or the period when the class is to be ascertained, but only as to a mere restriction which is to apply to each share as and when it comes into existence (u).

For instance, it has been held that a proviso for settlement of shares must be construed as applicable to each share separately, and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of a daughter born in his lifetime, and that she was entitled to a life interest in the

(t) *Kingsbury v. Walter*, *ubi. sup.*, at p. 194.

(u) *Re Game*, [1907] 1 Ch. 276, 280.

fund (x); and a provision that the daughter should take without power of anticipation is also valid (y).

Where there is a gift of a share of residue to a legatee with a direction that the share shall be retained by the trustees and held upon specified trusts, and the legatee predeceases the testator, the question may arise whether by the expression "the share" was meant an aliquot part of the estate, or the share which the legatee would have taken had he survived the testator. In the former case it would be subject to the trusts, but in the latter it would lapse by the death of the legatee. In ascertaining the sense in which the words are used the whole Will must be regarded (z).

Prevention of lapse by direction to retain share upon specified trusts.

Sect. 88 of the Wills Act provides "that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will."

Effect of s. 88 of Wills Act.

Under this section, for all the purposes of the Will, the legatee must be taken to have survived the testator (a).

Legatee taken to have survived testator.

If the child or other issue, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound; so also if he made a Will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition (b); and being property of which he was competent

Legatee competent to dispose of the property in his lifetime.

(x) *Re Russell*, [1895] 2 Ch. 698.

(y) *Re Game*, *ubi sup.*

(z) *Re Roberts*, (1885) 30 C. D. 234;

Re Pinborne, [1894] 2 Ch. 276; *Re Powell*, [1900] 2 Ch. 525; *Re Whit-*

more, [1902] 2 Ch. 66.

(a) *Re Hone's Trusts*, (1882) 23 C. D. 663.

(b) *Re Scott*, [1901] 1 K. B. 228, 239.

to dispose of it is liable to estate duty as property passing on his death (c).

Section applies to testamentary appointments under general but not under limited powers.

Section does not apply to class gifts.

Although this section applies to a testamentary appointment in the exercise of a general power, by reason of s. 27 which makes the subject of a general power part of the property of the testator, yet it does not apply to an appointment under a special power (d).

Further, this section has no application to a gift to children or other issue as a class (e); even though, in the events which happen, the class should consist of but one individual (f).

SECT. 2.—Of Disclaimer.

Where gifts are distinct legatee may disclaim the onerous and take benefit, *sees*, where gifts are not distinct:

Where there are two distinct gifts to the same person, one being onerous and the other beneficial, *prima facie* the donee may disclaim the onerous gift and take the other (g).

If, however, onerous property and beneficial property are included in the same gift, *prima facie* the legatee cannot disclaim the onerous and accept the beneficial, he must take the whole gift or none (h).

unless context shows contrary intention.

General devise and bequest upon trust for persons in succession treated as one aggregate property.

This *prima facie* rule may be rebutted if the Will manifests a sufficient intention of the testator to the contrary (i).

Where a testator gave all his real and personal estate, without reference to specific parts, to trustees upon trust for a tenant for life and remainderman, and one estate included in the gift was unincumbered and another incumbered, it was held that the equitable tenant for life could not accept the unincumbered estate and refuse the other, and that for the purpose of the construction of the Will it must be treated as one aggregate property given to her for her life, and the interest upon the charges on any part ought to be paid out of the aggregate income of the whole (k).

(c) *Re Scott*, [1901] 1 K. B. 228, 239.
(d) *Holyland v. Lewin*, (1884) 26 C. D. 266, 272.
(e) *Olney v. Bates*, (1855) 3 Drew, 319; *Browne v. Hammond*, (1859) Johns. 210; *Re Harvey* (Sir E.), [1893] 1 Ch. 567.

(f) *Re Harvey* (Sir E.), *ubi sup.*
(g) *Guthrie v. Walrond*, (1883) 22 C. D. 573.
(h) *Ibid.*; *Re Hotchkys*, (1886) 32 C. D. 408.
(i) *Ibid.*
(k) *Re Hotchkys*, *ubi sup.*

So where freehold property is devised in strict settlement and leaseholds are given on the same trusts, the gift is, so far as the difference in the nature of freeholds and leaseholds will admit, given as one with the freeholds. The division of the gifts into two is simply a proper mode of conveyancing in carrying out one aggregate gift to the same persons so far as the law will allow. What is given is the net result of the whole. Therefore since Locke King's Acts the aggregate charges are by the collective devise thrown on the aggregate lands in exoneration of the testator's personal estate (*l*), and the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates (*m*).

So leaseholds give upon same trusts as freeholds devised in strict settlement.

The same rule will apply although the gifts are in two different parts of the Will and of such absolutely distinct natures as a leasehold house and an annuity, if, on the construction of the Will, the Court determines that it is the intention (*n*).

Application of rule depends on construction of Will.

SECT. 3.—Of Election.

The foundation of election is that no one shall claim under and in opposition to the same instrument (*o*). The main principle is that there is an obligation on him who takes under a Will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect (*p*).

Principle stated.

The doctrine of election is sometimes called the doctrine of compensation (*q*). If a person whose property a testator

A doctrine of compensation.

(*l*) *Re Baron Kensington*, [1902] 1 Ch. 203.

Kensington, *ubi sup.*, at p. 209.

(*m*) *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511; *Honywood v. Honwood*, [1902] 1 Ch. 347.

(*o*) *Sug. on Powers* (8th ed.) p. 576.

(*p*) *Per* *Ld. Hatherley* in *Cooper v. Cooper*, (1874) L. R. 7 H. L. 53, 69.

(*n*) *Per* *Farwell, J.*, in *Re Baron*

(*q*) *Pickersgill v. Rodger*, (1876) 5 C. D. 163, 173.

affects to give away, takes other benefits under the same Will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives (*r*).

Obligation confined to confirming Will according to circumstances at death of testator.

The obligation, however, is confined to confirming the instrument so far as he is able. The equities of the parties must be determined according to the state of circumstances as they existed at the testator's death, and if at that time there is nothing which he can give up, no case of compensation can arise, as there is no choice and he merely takes under the Will (*s*).

Rule applies whether legatee entitled directly under Will or indirectly by virtue of s. 33 of Wills Act.

Person taking at law derivative interest, e.g., tenant by the curtesy, not put to his election.

Doctrine applies whether testator acted by design or by mistake.

Principle applies to invalid appointments under powers.

In applying the doctrine it makes no difference whether the person on whom the obligation rests to make compensation derived his title directly under the Will of the testator or by virtue of s. 33 of the Wills Act (1 Vict. c. 26) as being a child of a legatee who has died in the lifetime of the testator (*t*).

A devisee claiming by the Will is not precluded from enjoying a derivative interest to which he is entitled at law under a legal estate taken in opposition to the Will; thus, a husband may be tenant by the curtesy of the estate tail held by his wife against a Will under which he accepts benefits (*u*).

The doctrine applies whenever a testator gives property by design or by mistake which is not his to give, and gives at the same time to the real owner of it other property (*x*).

The principle has been applied where the first gift is made purporting to be in execution of a power, so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment also take under the Will other property, the grandchildren are entitled to put them to an election. But the rule is applied only as between a gift under a Will and a claim *dehors* the

(*r*) *Rogers v. Jones*, (1876) 3 C. D. 688.

(*s*) *Re Lord Chesham*, (1886) 31 C. D. 466.

(*t*) *Pickersgill v. Rodger*, *ubi sup.*

(*u*) *Dillon v. Parker*, (1818) 1 Swan,

359, 408, n., but see per Ld. Hatherley in *Cooper v. Cooper*, (1874) L. R. 7 H. L. 53, 69.

(*x*) *Wollaston v. King*, (1869) L. R. 8 Eq. 165, 173.

Will, and adverse to it, and is not to be applied as between one clause in a Will and another clause in the same Will. Consequently, where a testator by his Will exercised a power of appointment over a settled fund in a manner which as to portion of the fund was void for remoteness, and made a valid residuary appointment of the fund, which took up the portion badly appointed, the residuary appointees were allowed to retain both benefits, because they took both as appointees under the Will itself without calling in aid any other instrument or any adverse title (*y*).

Where a Will exercises a power under a settlement and disposes also of the testator's own property, in applying the doctrine of election it is material to consider whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. The doctrine will not be applied for the purpose of enabling the testator to evade a rule of law founded on public policy, as for instance the rule against perpetuities (*z*).

Doctrine not applied to enable testator to evade rule founded on public policy, e.g., rule against perpetuities.

The doctrine of election rests on the presumption of a general intention in the author of an instrument that effect shall be given to every part of it, but this presumption is rebutted by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention, as for instance where the benefits which a married woman derives under the instrument which puts her to her election are expressed to be without power of anticipation, for under such circumstances if the doctrine of election and compensation applied she would be depriving herself of the benefit of that which the testator intended should be inalienable during coverture (*a*).

Doctrine not applied where Will contains particular intention rebutting presumption of general intention. Effect where gift is to a married woman without power of anticipation.

In *Hamilton v. Hamilton* (*b*), North, J., decided that a benefit given to a married woman without power of anticipation would be available for compensating others disappointed

(*y*) *Wollaston v. King*, *ubi sup.*

(*z*) *Re Oliver's Settlement*, [1905] 1 Ch. 191; *Re Beale's Settlement*, [1905] 1 Ch. 256; *Re Wright*, [1906]

2 Ch. 288.

(*a*) *Re Vardon's Trusts*, (1885) 31 C. D. 275.

(*b*) [1892] 1 Ch. 396.

by her election on the restraint ceasing by the death of her husband in her lifetime. But in *Haynes v. Foster* (c) Kekewich, J., held that the restraint on anticipation showed an intention inconsistent with the application of the doctrine at all, and therefore such intention was not limited or affected by the married woman subsequently becoming discover.

Incapacity arising from infancy or coverture not sufficient to exclude doctrine.

Mere personal incapacity arising from infancy or coverture on the part of the person put to his or her election is not sufficient to exclude the application of the doctrine, as in such cases the Court will make the election for the benefit of the infant or married woman, and bind the interest of the party entitled to set up a paramount title by an appropriate declaration (d).

Intention of testator must be manifest.

The intention of the testator to dispose of property which is not his must be manifest, and it is difficult to apply the doctrine of election when the testator has some interest in the estate disposed of though not entirely his own (e).

Effect of general devise or bequest.

So a general devise or bequest is insufficient to show an intention to include therein the property of another person, and evidence of intention in this respect *dehors* the Will is inadmissible (f).

Doctrine applicable to all inconsistent interests whether immediate or contingent.

The doctrine of election is applied to interests in respect, not of their amount, but of their inconsistency with the testator's intention, and therefore it is applicable alike to interests immediate, remote, contingent, of value, and not of value (g).

What amounts to an election.

The acts of a party bound to elect between two inconsistent rights in order to constitute election must imply a knowledge of the rights and an intention to elect; possession being under the circumstances equivocal, as referable to either right, but the execution of deeds containing recitals of the character in which the party claimed and the exercise of a power to dispose of the estates in that character, amount to conclusive evidence of election (h).

(c) [1901] 1 Ch. 361.

(d) *Re* Ld. Chesham, (1886) 31 C. D. 466, 472.

(e) *Dillon v. Parker*, (1818) 1 Swan. 359, 402, n.

(f) *Ibid.*; *Clementson v. Gandy*, (1836) 1 Keen, 309.

(g) *Dillon v. Parker*, *ubi. sup.*, 407, n.

(h) *Dillon v. Parker*, *ubi sup.*

The amount of compensation payable to the persons disappointed by the election is to be ascertained as at the date of the death of the testator, and not as at the time when the election is made (*i*). Where the person electing to renounce the Will has been in possession, there must be a retrospective account of rents and profits, and an account of sums expended for melioration of the estate, which must be reimbursed (*k*).

Amount of compensation ascertained as at death of testator.

Persons electing against the Will must compensate others also so electing against the Will, and the compensation paid to the latter must be included in the benefits received by them under the Will (*l*).

Persons electing against Will must compensate others also so electing.

SECT. 4.—Of Invalid Devises and Bequests.

(1) *Bequest to attesting witness or to his or her wife or husband.*

With regard to Wills made on or after 1st January, 1838, s. 15 of the Wills Act, 1837 (1 Vict. c. 26), enacts "That if any person shall attest the execution of any Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will."

This statute makes void a devise or bequest to an attesting witness although there are sufficient other attesting witnesses to the Will (*m*).

Bequest void notwithstanding other sufficient attesting witnesses.

(*i*) *Re Hancock*, [1905] 1 Ch. 16.

(*j*) *Re Booth*, [1906] 2 Ch. 321.

(*k*) *Gretton v. Haward*, (1818) 1 Swan. 409, 434; *Re Hancock*, *ubi sup.*

(*m*) *Wigan v. Rowland*, (1853) 11 Hare, 137.

When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterwards adds his name, the Court will not come to the conclusion, without cogent evidence, that that third person signed as an attesting witness. If the name is not the name of an attesting witness, it is not a part of the Will, and ought not to appear in the probate (*n*).

Attestation must be of same instrument whereby beneficial interest is given.

The attestation must be of the same instrument whereby the beneficial interest is given. Consequently, a bequest of a legacy by a Will is not void because the legatee attests a codicil which gives him nothing, nor does a residuary legatee lose his title by attesting a codicil which by revoking legacies indirectly benefits him by increasing the residue (*o*).

Void gift made effectual by republication by codicil.

Although a gift by a valid Will to an attesting witness is void, such gift may be rendered effectual if the Will is republished by a codicil referring to the Will, but not attested by the legatee, and this benefit will not be lost to the legatee by his subsequent attestation of a second codicil (*p*).

Gift not void by subsequent marriage to attesting witness.

A benefit given by a Will is not rendered void under s. 15 of the Act by the subsequent marriage of the beneficiary to an attesting witness (*q*).

Interest given must be a beneficial interest.

To come within s. 15 the interest given to the attesting witness, or his or her wife or husband, must be a beneficial interest; a devise or bequest to an attesting witness as trustee, either for others named (*r*), or for the purpose merely of directing the disposition of the legacy (*s*), is not void under the section.

Effect of void gift on construction.

The benefit given to the attesting witness or to his or her wife or husband, although invalidated by s. 15, is not to be treated, for the purpose of construction, in ascertaining the interests of other beneficiaries under the Will, as struck out of

(*n*) In the Goods of Sharman, (1869) L. R. 1 P. & D. 661, 663.

Q. B. D. 311.

(*o*) Gurney v. Gurney, (1855) 3 Dr. 208.

(*r*) In the Goods of Ryder, (1843) 2 N. C., 462.

(*p*) *Re Trotter*, [1899] 1 Ch. 764.

(*s*) *Cresswell v. Cresswell*, (1866) L. R. 6 Eq. 60.

(*q*) *Thorpe v. Bestwick*, (1881) 6

the Will. The proper way of dealing with these cases is first to construe the Will and ascertain what interests are given, and then to apply s. 15 of the Act. In some cases the effect of the section has been held to create an intestacy as to the benefit which fails (*t*), and in other cases interests in remainder have been held to be accelerated by the failure of the prior void life interest (*u*). In construing class gifts the rule would seem to be that those members of the class who are at the testator's death capable of taking take the whole, and that those who become incapable of taking, whether by dying in the testator's lifetime or by attesting the Will or by some other operation of law are excluded (*x*).

(2) *Gifts tending to a Perpetuity.*

A gift which may endure or is inalienable for a period exceeding a life or lives in being and twenty-one years afterwards is a perpetuity which the policy of the law does not allow, and unless it can be supported as a charitable bequest it is void (*y*). For instance, a gift for the perpetual repair of a particular tomb or vault in a churchyard is not a charity and is void (*z*); so a gift for ever for keeping up a building of no public benefit and for a merely private purpose (*a*), or a gift of a perpetual annuity to the person, who, for the time being, shall hold a particular office, as to the custodian for the time being of such a building as above mentioned (*b*), are void gifts. But a condition may be imposed on a legatee during his life to keep the testator's vault in repair, as it does not tend to a perpetuity (*c*).

Gifts tending to a perpetuity void, unless charitable.

But a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the

Effect of gift to a perpetual institution not charitable.

(*t*) *Re Townsend's Estate*, (1886) 34 C. D. 357; *Alpin v. Stone*, [1904] 1 Ch. 543.

(*u*) *Jull v. Jacobs*, (1876) 3 C. D. 703; *Re Clark*, (1885) 31 C. D. 72.

(*x*) *Re Coleman & Jarrow*, (1876) 4 C. D. 165.

(*y*) See also *post*, pp. 442, 468, as to gifts void for remoteness.

(*z*) *Hoare v. Osborne*, (1866) L. R. 1 Eq. 585, 588, and see *Re Vaughan*, (1886) 33 C. D. 187, 190.

(*a*) *Thomson v. Shakespeare*, (1859) John. 612.

(*b*) *Ibid.*

(*c*) *Lloyd v. Lloyd*, (1852) 2 Sim. (N. S.) 255, 264; *Re Dean* (1889) 41 C. D. 552, 557.

Effect of gift for the benefit of individual members of a perpetual association.

legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift or which by reason of the constitution of the association in whose favour it is made tends to a perpetuity, the gift is bad (*d*).

In applying this principle it was held in *Re Clarke* (*e*) that a bequest "to the Committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to that corps" did not tend to create a perpetuity and was a good gift.

Gift to charity upon a future and uncertain event.

A gift in trust for charity, conditional upon a future and uncertain event, is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the rules of law against perpetuities, the gift fails *ab initio* (*f*).

Immediate charitable bequest not void because particular application may never take effect.

Where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all. Where, therefore, a testatrix directed that when and as soon as land should at any time be given for the purpose moneys bequeathed by her should be expended in the erection of almshouses, it was held that this was not a conditional and contingent gift, but was an absolute immediate gift to charity, the mode of execution only being made dependent on future events (*g*).

Effect of gift from one charity to another in a certain event.

The rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another (*h*), consequently, although a gift for keeping in repair

(*d*) Per Byrne, J., in *Re Clarke*, [1901] 2 Ch. 110, 114; and see *post*, p. 438.

(*e*) [1901] 2 Ch. 110.

(*f*) *Chamberlayne v. Brockett*, (1872) L. R. 8 Ch. 206, 211.

(*g*) *Chamberlayne v. Brockett*, *ubi sup.*, and see *Wallis v. Sol.-Gen. for New Zealand*, [1903] A. C. 173, 186, per *Ld. Macnaghten*.

(*h*) *Christ's Hospital v. Grainger*, (1850) 1 Mac. & G. 460.

a family vault in a cemetery is void, yet a gift to the trustees of a charity with a gift over to another charity, on the first donees failing to comply with the request to keep in repair the family vault, is good (i).

The principle that the rule against perpetuities has no application to the transfer, in a certain event, of property from one charity to another, does not extend to cases where an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or where an immediate gift in favour of charity is followed by an executory gift in favour of private individuals (k).

Effect of immediate gift to private individual followed by executory gift over to charity, or *vice versa*.

Those purposes are charitable which the stat. 48 Eliz. c. 4 enumerates or which by analogies are deemed within its spirit and intendment (l).

What are charitable bequests.

The Mortmain and Charitable Uses Act, 1888, repealed 48 Eliz. c. 4, but s. 13 (2), after reciting the preamble to that Act and that in divers enactments and documents reference is made to charities within the meaning, purview and interpretation of the said Act, enacts that references to such charities shall be construed as references to charities within the meaning, purview and interpretation of the said preamble.

51 & 52 Vict. c. 42, s. 13 (2).

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for the purposes beneficial to the community not falling under any of the preceding heads (m).

Four principal divisions.

But every object of general public utility is not necessarily a charity (n).

Objects of general public utility.

Purposes of benevolence or private charity, and many

Purposes of liberality and benevolence or private charity.

(i) *Re Tyler*, [1891] 3 Ch. 252.

(k) *Re Bowen*, [1893] 2 Ch. 491.

(l) *Morice v. Bishop of Durham*, (1804) 9 Ves. 399, 405; as to what have been held to be charitable objects within the express words or within the spirit of the statute, see *Tudor's Charitable Trusts*, and *Williams* (10th ed.) 820 *et seq.*

(m) *Per* *Ld. Macnaghten* in *Com-*

missioners of Income Tax v. Pemsel, [1891] A. C. 531, 583; and see *Theobald on Wills* (7th ed.) at p. 351. *et seq.*, where the cases may be found classified with reference to those divisions; see also *Re Good*, [1905] 2 Ch. 60; *Re Allen*, [1905] 2 Ch. 400.

(n) *Kendall v. Granger*, (1842) 5 Beav. 300; and see *Re Macduff*, [1896] 2 Ch. 451; *Re Sidney*, [1908] 1 Ch. 488.

philanthropic purposes, do not come within the technical denomination of charitable purposes (o).

Effect of
bequest com-
bining charit-
able and other
purposes not
charitable.

The law applicable to the case of a bequest made for charitable and other purposes not charitable is thus stated by Lord Davey in *Hunter v. Attorney-General* (p): "There are two classes of authorities. On the one hand, there is a long series of cases extending from *Morice v. Bishop of Durham* (q), decided by Sir William Grant and Lord Eldon, to *In re Macduff* (r), decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent,' or 'charitable or philanthropic,' or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty. On the other hand, it has been decided in cases such as *Attorney-General v. Doyley* (s) and *Salisbury v. Denton* (t) that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally.

"A third class of cases was relied on by the Attorney-General, of which *Sinnett v. Herbert* (u) and *In re Douglas, Obert v. Barrow* (x) are examples, in which there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternate modes of application

(o) *James v. Allen*, (1817) 3 Mer. 17; *Ommanney v. Butcher*, (1823) 1 T. & R. 260; *Re Macduff*, *ubi sup.*; *Re Sidney*, *ubi sup.*

(p) [1899] A. C. 309, at p. 323.

(q) (1804) 9 Ves. 399; 10 Ves. 321.

(r) *Ubi sup.*, and see *Grimond* (or

Macintyre) *v. Grimond*, [1905] A. C. 124; *Re Sidney*, [1908] 1 Ch. 126.

(s) (1735) 4 Vin. Abr. 485, 7 Ves. 58, n.

(t) (1857) 3 K. & J. 529.

(u) (1872) L. R. 7 Ch. 232.

(x) (1887) 35 C. D. 472.

is invalid in law. In such cases the trust is good, and the Court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable."

Where there is a gift of money on trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, if the first gift fails, the whole income falls into the surplus, and that whether the extreme sum required for the first purpose can be fairly ascertained or not (*y*). The real question in these cases is whether on the true construction of the gift the trust for the application of income for the first purpose which failed was to be a charge on the whole income, and the residue was to go to the charitable purpose (*z*).

Effect of bequest to apply portion of income for definite purpose which fails.

Where there is a gift to charity generally, indicative of a general charitable purpose, and the mode of carrying it into effect is indefinite or fails, the general purpose of charity shall be carried out. If the purpose is indefinite it is for the King by sign manual to deal with the fund, but if there is an object pointed out, the fund will be administered by the Court under the doctrine of *cy-près*. But where the gift is for a particular charitable institution existing at the date of the Will but which has ceased to exist at the testator's death, the gift fails altogether and the ordinary doctrine of lapse applies, and the heir-at-law or residuary devisee or next-of-kin or residuary legatee, as the case may be, becomes entitled to the property (*a*).

Where general intention is charitable but the particular mode of application fails.

Where particular charity had ceased to exist at death of testator.

A gift to a charitable institution in trust for such other societies as it may deem most in need of help does not indicate a general charitable intent and fails entirely (*aa*).

(8) Gifts for Superstitious Uses.

A superstitious use is described to be where lands, tenements, rents, goods, or chattels are given, secured, or appointed for and towards the maintenance of a priest, or other man, to pray for the soul of any dead man, in such a

What are superstitious uses.

(*y*) Williams (10th ed.) 830; Fisk v. Att.-Gen., (1867) L. R. 4 Eq. 521; *Re* Rogerson, [1901] 1 Ch. 715.

(*z*) *Re* Rogerson, *ubi sup.*, at p. 718.

(*a*) See *Re* Rymer, [1895] 1 Ch. 19; *Re* Davis, [1902] 1 Ch. 876, 888.

(*aa*) *Re* Freeman, [1908] 1 Ch. 720.

church, or elsewhere; to have or maintain perpetual obits, lamps, torches, etc. to be used at certain times, to help to save the souls of men out of purgatory (b).

Bequest that a person may have benefit of prayers and masses for repose of his soul is void.

There is no statute making superstitious uses void generally. The stat. 1 Edw. VI. c. 14 relates only to superstitious uses of a particular description then existing, and does not declare any such gift to be unlawful, but avoids certain superstitious gifts previously created (c). That statute, however, has been considered as establishing the illegality of gifts as above described (d). It was accordingly held in *West v. Shuttleworth* (e) that a direction by a testatrix in her Will to pay sums to certain Roman Catholic priests and chapels, desiring that she might have the benefit of their prayers and masses for the repose of her soul and that of her deceased husband, not being intended for the benefit of the priests personally or for the support of the chapels for general purposes, but for the benefit of their prayers for the repose of the testatrix's soul and that of her deceased husband, was void.

In *Read v. Hodgins* (f) it was decided that the law, or policy of the law, which in *West v. Shuttleworth* was held to underlie the stat. of Edw. VI., did not apply to Ireland, in which there was no analogous statute, and consequently in Ireland a gift for masses is not illegal as a superstitious use.

But bequest for public celebration of masses for repose of a person's soul would seem to be a valid charitable gift.

In *O'Hanlon v. Logue* (g), where a testatrix by Will declared that the proceeds of sale of her property should be invested and the income paid from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of masses for the repose of the souls of her late husband, her children and herself, which would clearly be void as creating a perpetuity, it was held by the Court of Appeal in Ireland that it was a valid charitable gift, on the ground that it is the performance of an act of the Church of the most solemn kind, which results in benefit to the whole body of the

(b) Bac. Abr. vol. 2, Charitable Uses and Mortmain, Tit. D. p. 37.

(c) *Cary v. Abbot* (1802) 7 Ves. 490, 495.

(d) Williams (10th ed.) 803.

(e) (1835) 2 My. & K. 684.

(f) (1844) 7 Ir. Eq. R. 17.

(g) [1906] 1 I. R. 247.

faithful, and is for the advancement of religion, and that the charitable nature of a divine service must (when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question. In this case the Lord Chancellor, Sir Samuel Walker, stated the following three propositions as established:

(1) That in speaking of what is "charitable" we use the word in the artificial sense which is derived from the stat. 43 Eliz. c. 4 (Eng.) and 10 Car. I. s. 3, c. 1 (Ir.);

(2) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit;

(3) that a gift for the advancement of religion is a charitable gift, and that in applying this principle the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it is not contrary to morals and contains nothing contrary to law (*h*).

No inquiry to be made as to soundness of religious doctrine not contrary to morals or law and intended for public benefit.

Formerly a superstitious use was defined to be "one which has for its object the propagation of the rites of a religion not tolerated by the law" (*i*). The persons who differed from the established religion and were formerly held to be obnoxious to the law against superstitious uses were Protestant dissenters, Roman Catholics and Jews.

History of religious toleration.

The Toleration Act, 1689 (1 Will. & M. c. 18), and certain subsequent statutes exempted the schools and places for religious worship, education, and charitable purposes of Protestant dissenters from the operation of certain penal and disabling laws, and thereupon the Court was bound to administer trusts for the benefit of Protestant dissenting congregations (*k*).

The Toleration Act, 1689.

The stat. 2 & 3 Will. IV. c. 115 puts persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education, and charitable purposes in Great Britain, as Protestant dissenters.

Roman Catholic Relief Act, 1832.

(A) See per Farwell, J., in *Re Delany*, [1902] 2 Ch. 642, 648; *post*, referred to in *Tudor's Charitable Trusts*.

p. 440.

(i) *Boyle on the Law of Charities*, (A) *Att.-Gen. v. Pearson*, (1817) 3 Mer. 353.

E.

But nothing in the Act shall be taken to repeal the stat. 10 Geo. IV. c. 7 respecting the suppression or prohibition of the religious orders or societies of the Church of Rome bound by monastic or religious vows (*l*); nor the provisions of 9 Geo. II. c. 36 respecting gifts in mortmain (*m*).

28 & 24 Vict. c. 134, s. 1, provides that no gift or disposition upon any lawful charitable trust for persons professing the Roman Catholic religion shall be invalidated by reason only that the same shall also be subject to any trust or provision deemed to be superstitious or otherwise prohibited by the laws affecting persons professing the same religion, and provides for the apportionment of property so given, so that a proportion may be exclusively subject to the lawful charitable trusts declared by the donor and the residue may become subject to such lawful charitable trusts to take effect in lieu of such superstitious or prohibited trusts as the Court or judge or charity commissioners may consider just.

By 9 & 10 Vict. c. 59 Jewish charities were put on the same footing as the charities of Protestant dissenters.

The stat. of 1 Edw. VI. expressly gives to the King such property devoted to superstitious uses as comes within the terms of that Act. But it was held in *West v. Shuttleworth* (*n*) that where the object of the gift is charity the duty of appropriating the amount of the legacy to other charitable purposes devolves upon the Crown, but, where the intention is not to benefit the priests, or to support the chapels, but to secure a supposed benefit to the testatrix herself which cannot be carried into effect the next-of-kin are entitled.

(4) *Gifts void under the Mortmain Acts.*

The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), amends and consolidates the former law chiefly contained in the Act 9 Geo. II. c. 36.

Part I, s. 1, of the Act of 1888 provides for the forfeiture to His Majesty of land assured (including by s. 10 assurance by

Jewish
Charities Act,
1846.

Mode of
application
when gift
fails.

Effect of
Mortmain
Act, 1888.

(*l*) See *post*, p. 437.
(*m*) See *infra*.

(*n*) *Ubi sup.*

deed, Will or other instrument) to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from His Majesty or of a statute.

In case of a devise by a freeman of London, of land within the city, the former statute did not apply; for by the custom of London, freemen may devise in mortmain lands within the city (*o*), and by s. 12 of the Act of 1888 nothing therein shall affect the operation or validity of any charter, licence, or custom in force at the passing of the Act, enabling land to be assured or held in mortmain.

Exception of devise by freeman of London of land within the City.

The Act of 1888 rendered all assurances of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, void unless made in accordance with the requirements of the Act (*p*).

The Act of 1888 does not extend to Scotland or Ireland (s. 11); nor, as it is local, will it extend to prohibit dispositions of real estate, or personal property connected with real estate, in the West Indies, or other colonies. But bequests of personal estate connected with real estate in England, to be laid out in land in Scotland, Ireland, etc., for charitable uses, were, prior to the Act of 1891, held void (*q*).

Act does not extend to Scotland, Ireland, or colonies.

Under the repealed Mortmain Act (9 Geo. II. c. 36), as under the Act of 1888, there was no restriction upon any one leaving a sum of money, or any other estate purely personal, to charitable uses, yet not only devises of land, copyhold as well as freehold, and bequests of money to be invested in land, were held void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged on real estate, or of money to arise from the sale of real estate, even though such real estate was partnership property, or the proceeds of

Act extended to all bequests affecting or relating to interests in land.

(*o*) Williams (10th ed.) 816.

(*p*) By Part 3, s. 6 of the Act and by other Acts there are exemptions from the provisions relating to

mortmain, which will be found collected in the authorised Chronological Index to the Statutes.

(*q*) Williams (10th ed.) 825.

growing crops, bequests of terms for years, or of money due on mortgage, or of money secured on tolls or rates where an interest in land is thereby created, were void (*r*). So a sum of money secured by mortgage of both real and personal estate could not be given to a charity, and there could not be any apportionment so as to make a part of the sum available for charity (*s*).

Distinction between bequests to exonerate and in amelioration of land in mortmain.

Although a bequest of money to exonerate lands in mortmain was within the statutes, a bequest of money to be applied simply in the amelioration of lands in mortmain, or for building upon them, or repairing buildings already erected, was held not within the statutes, the object of which was merely to prevent any addition to the quantity of land already in mortmain (*t*).

Effect of Act of 1891, 54 & 55 Vict. c. 78

Now, as to testators dying after the 5th August, 1891, the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 78), s. 8, excepts money secured on land or other personal estate arising from or connected with land from the operation of the Act of 1888, and it has been held that the exception covers the case of land devised on trust for sale (*u*).

By sect. 5, "Land may be assured by Will to or for the benefit of any charitable use, but except as hereinafter provided, such land shall, notwithstanding anything in the Will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers or by the charity commissioners."

Where the devise is to trustees upon trust to sell and hand over the proceeds to a charity, the gift to the charity being personal estate arising from land within the exception to s. 8, the trustees are not obliged to sell the land within a year from the testator's death, but may retain it without obtaining the leave of the Court. They are not, however, at liberty to postpone the sale indefinitely (*x*).

(*r*) Williams (10th ed.) 808, 809; and see also Williams (10th ed.) 806, 816, as to what sort of property the above Mortmain Acts do or do not apply and the cases there collected.

(*s*) *Re Watts*, (1885) 29 C. D. 947.

(*t*) Williams (10th ed.) 818.

(*u*) *Re Wilkinson*, [1902] 1 Ch. 841; *Re Sidebottom*, [1902] 2 Ch. 389.

(*x*) *Re Sidebottom*, *ubi sup.*

By s. 6, after the expiration of the time limited for sale by s. 5, the land unsold, where the exception to s. 3 does not apply, vests forthwith in the official trustee of charity lands, to be sold under order of the charity commissioners.

By s. 7, "Any personal estate by Will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land" (y).

(5) *Bequests to or for the benefit of Religious Orders.*

By 10 Geo. IV. c. 7, ss. 27 *et seq.* (the Catholic Emancipation Act), provision is made for the gradual suppression and final prohibition within the United Kingdom of Jesuits, and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows. Consequently societies of such persons are illegal within the United Kingdom and bequests to them are void.

Roman Catholic Emancipation Act, 1829.

Sect. 37 of the Act provides that nothing therein contained shall extend or be construed to extend in any manner to affect any religious order, community or establishment consisting of females bound by religious or monastic vows.

Act does not extend to religious orders of females.

Sect. 15 of 7 & 8 Vict. c. 97 (authorising endowments for the Roman Catholic clergy and their places of worship) provides that nothing therein shall render lawful any bequest or donation in favour of any religious order prohibited by 10 Geo. IV. c. 7, in favour of any member or members thereof, and this has been considered as a legislative declaration that a bequest or donation to or for the benefit of the community legislated against by the Catholic Emancipation Act was in 1844 illegal, and if illegal then it is still illegal, notwithstanding penalties under the Act seem never to have been enforced (x).

In *Sims v. Quinlan* (a) a bequest to be applied for the

(y) See *Re Sutton*, [1901] 3 Ch. 640, as to the meaning of the words "charitable uses."

(z) See *Cussen v. Hynes*, [1906] 1 I. R. 539.

(a) (1864) 17 Ir. Ch. Rep. 43.

education and maintenance of two priests of the order of St. Dominick in Ireland was held to be wholly void by the operation of the Act of 10 Geo. IV. c. 7, and so also a bequest to a priest upon a secret trust to apply it to the redemption of the rent of a Roman Catholic Church in Cork held by certain Dominican monks as trustees and used as one of the principal places of worship in that city.

In *Cussen v. Hynes* (b) there were (1) a bequest to the Superior, Rochestown Convent, county Cork, for the education of a priest for that community, and (2) a bequest to the Superior, Holy Trinity Church, Charlotte Quay, Cork, for the community. Evidence was given that the convent and the church both belonged to the Franciscan Order, and it was held by the Court of Appeal in Ireland that both bequests were void as within the prohibition created by 10 Geo. IV. c. 7.

A gift may be lawfully made to the Superior in his individual capacity, or to any Capuchin priest; but when it is given to the community of which he happens to be one, and the community is the object to be benefited, it falls within the very words and policy of the Act (c). So also in the case of the gift to the Capuchin Church, it is impossible to get rid of the effect of the illegality of the object of the bequest by the character of the work done by it (d).

It would seem, however, that a community, illegal as such, may be made the recipient of a bequest expressly devoted to a lawful purpose, which the community is bound to carry out—on the principle that a valid and lawful trust is not to be defeated for want of a proper trustee (e).

A bequest to a religious community of women may be either a charitable bequest or a non-charitable bequest. The result of the cases would appear to be that a gift not charitable to such a religious community, including not only the existing members, but also all persons who should be, or become

Gift for the benefit of the individual is good, but for the benefit of the community is bad. Character of work done does not get rid of illegality.

Effect of gift to illegal community upon a valid trust.

Effect of gift, non-charitable, to a community of women.

(b) [1906] 1 I. R. 539.

(c) *Ibid.*, per Sir Samuel Walker, C., at p. 543.

(d) *Ibid.*, per FitzGibbon, L.J., at

p. 547; see also *Walsh v. Walsh*, (1869) Ir. R. 4 Eq. 396.

(e) *Cussen v. Hynes*, *ubi sup.*, per FitzGibbon, L.J., at p. 545.

thereafter, members of it, during a period capable of extending beyond the legal limits prescribed by the rule against perpetuities, is void; but that if such gift, according to its true construction, is one to the individuals composing the community at the death of the testator, or some other term within legal limits appointed for ascertaining the class of such individuals, the gift is valid. It was accordingly held in *Morrow v. McCune (f)* by the Vice-Chancellor in Ireland, that a gift to the use and benefit of the Roman Catholic convent of St. Joseph's, Limerick, was void. For though in the case of a convent there is not a succession recognised by law and necessary for a corporate existence, yet there is a succession in fact, and still in popular estimation it is the same convent, having in many cases endured for centuries, and being like to endure certainly beyond legal limits. In the same case the Vice-Chancellor refused an inquiry as to what the object and purposes of the convent were, as he did not think parol evidence could be properly resorted to for the purpose of converting a trust not charitable upon the face of the Will into a charitable trust.

Parol evidence inadmissible to convert gift non-charitable on the face of Will into charitable trust.

In *Cocks v. Manners (g)* a bequest to the Dominican convent at Carisbrook (payable to the Superior for the time being), being a religious community living in a state of celibacy, under a common superior, for the purpose of sanctifying their own souls by prayer and pious contemplation, was held not to be a charitable trust, nor was it void for perpetuity, since when paid to the superior of the convent it would be subject to no trust which would prevent the existing members of the convent from spending it as they pleased, and was therefore good both as to pure and impure personalty (h).

Effect of gift for a convent.

But in the same case a bequest to the Sisters of the Charity of St. Paul at Selly Oak (payable to the Superior thereof for the time being), being a similar community whose primary object was personal sanctification, yet as a means thereto employed themselves in the exercise of works of piety and

(f) (1883) 11 L. R. Ir. 236.

(g) (1871) L. R. 12 Eq. 574.

(h) See also *Re Wilkinson's Trusts*, (1887) 19 L. R. Ir. 531.

charity in teaching the poor and nursing the sick, was held to be a charitable bequest, and consequently, as the law then stood, only good as to the pure personalty.

Religious purposes are charitable only when the religious services tend directly or indirectly towards the instruction or the edification of the public (i). There is no "charity" in attempting to improve one's own mind or save one's own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others, but given the latter, the motive impelling it is immaterial (k).

Gift to a person as holder of an office.

Questions sometimes arise whether persons named as legatees are intended to take a personal benefit, or are designated only as the then holders of office, and the gift to them to depend on their continuance in such office.

A gift to the minister of the Roman Catholic chapel at Kendal was held to be a gift to the minister as such and a charitable bequest (l). A gift to the person now minister would have been different. The mere description of the legatee as the holder of an office is not sufficient to raise any such inference (m).

A gift to the vicar and churchwardens for the time being of K. to be applied by them in such manner as they shall in their sole discretion think fit is a good charitable gift for ecclesiastical purposes (n).

Gift to superior of convent or her successors.

Lord Eldon expressed his opinion that a legacy for such purposes as the superior of the convent or her successor should judge most expedient, being given in that character, was sufficient to show it to be for a superstitious use as the law then stood (o).

Gift to A. B. & C., or their successors, known to testator as officials of a religious community.

In *Re Delany* (p) the gift was to A., B. & C., Nazareth House, Hammersmith, or their successors. A., B. & C. were

(i) See also *Re Wilkinson's Trusts*, (1887) 19 L. R. Ir. 531.

(k) Per Farwell, J., in *Re Delany*, [1902] 2 Ch. 642, 648, following Cock v. Manners, *ubi sup.*

(l) *Thornber v. Wilson*, (1855) 8 Drew. 245.

(m) *Ibid.*; *Doe v. Aldridge*, (1791) 4 T. R. 264; *Re Delany*, *ubi sup.*, at p. 647.

(n) *Re Garrard*, [1907] 1 Ch. 392.

(o) *Smart v. Prujean*, (1801) 6 Ves. 560, 567.

(p) [1902] 2 Ch. 642.

members and officials of a religious community, who were living together in a state of celibacy for the purpose of sanctifying their souls by prayer and pious contemplation, and also with the object of affording permanent homes for aged and infirm persons of both sexes. The persons named were known to the testator to be holders of office in the association. It was held that the bequest was not a gift to the named individuals for their own personal benefit, but to them as holders of office, and for the benefit of the association, which being charitable, and the gift being out of the proceeds of land under the Will of a testator who died in 1886, was void under the Mortmain Act.

In *Attorney-General v. Power* (q) it was held that as the law does not recognise any such corporate character as a Roman Catholic archbishop or Roman Catholic bishop a bequest to him and his successors in that character was void. But where the devise was to Cardinal Cullen, and in case of his death to the Roman Catholic Archbishop for the time being of Dublin and to his heirs, etc., absolutely for his and their own use and benefit, the devise was held to be a clear gift for the personal benefit of the devisees (r).

Gift to Roman Catholic Archbishop and his successors.

(6) *Gifts contra bonos mores or against Public Policy.*

With regard to gifts to future illegitimate children, it would seem such gifts are not void as *contra bonos mores*, if so couched as to avoid any inquiry as to the paternity of the child, but if the identity can only be ascertained by evidence of paternity, it will not be admitted, as being contrary to public decency (s).

Involving inquiry as to paternity of illegitimate child.

Bequests contravening the policy of a statute, for instance, the Mortmain Act, or the stat. 10 Geo. IV. c. 7, are void.

Against policy of a statute.

So also in *Thrupps v. Collet* (t), the Court would not give

To protect persons against consequences of criminal offences.

(g) (1809) 1 Ball & B. 145.

(r) *Donnellan v. O'Neill*, (1870) 1. R. 5 Eq. 523.

(s) See Williams (10th ed.) 856 and *just*, p. 545.

(t) (1858) 26 Beav. 125.

effect to a bequest as charitable which would protect persons from the consequences of their offences against the law, as for purchasing the discharge of poachers committed to prison for non-payment of fines, fees, or expenses under the Game Laws.

Encouraging doctrine of papal supremacy over sovereignty of the State.

Again, it has been held that a gift is against public policy and void if it is intended to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the Pope in ecclesiastical matters over the sovereignty of the State (u).

(7) *Invalid Directions for Accumulation of Income.*

Accumulations infringing rule against perpetuities.

Any attempt to sever income from the legal ownership beyond the legal limits allowed by the rule against perpetuities is wholly void, and a trust for accumulation if bad in this respect is wholly bad (x). But where the trust for accumulation is for the benefit of the devisees or legatees and the limitations of the property are valid, the trust for accumulation cannot infringe the rule, since there would necessarily be a person who, within the period allowed by law, would have the absolute command over the property and by consequence over the trust (y). Thus a trust for accumulation for the purpose of paying the testator's debts is valid, since it does not prevent vesting, and the owner can pay off the charge and put an end to the trust (z).

In *Thellusson v. Woodford* (a) a direction to accumulate rents and profits and the produce of timber, and to invest in the purchase of real estates, during the lives of the survivor of the testator's sons and grandsons, and of such other issue as the sons or grandson might have, as should be living at the death of the testator, or born in due time afterwards, and after

(u) *De Themmines v. De Bonneval*, (1828) 5 Russ. 288.

(x) *Lord Southampton v. Marquis of Hertford*, (1813) 2 V. & B. 54; *Marshall v. Holloway*, (1818) 2 Sw. 432, 450; *Scarsbrick v. Skilmerdale*, (1850) 19 L. J. Ch. 126.

(y) *Miller v. Stanley*, (1864) 2

De G. J. & S. 183, 192.

(z) *Marshall v. Holloway*, *ubi sup.*, at p. 446; *Bateman v. Hotchkin*, (1847) 10 Beav. 426; *Briggs v. Earl of Oxford*, (1852) 21 L. J. Ch. 829; *Tewart v. Lawson*, (1874) L. R. 18 Eq. 490.

(a) (1798) 4 Ves. 227, 1 R. R. 357.

the death of the survivor to divide the estates among the descendants of the testator then living, was established as a valid disposition. In order to restrict such accumulations the Thellusson Act, 1800 (39 & 40 Geo. III. c. 98), was passed, and enacts that any direction for the accumulation of income from real or personal property is void, if for any longer period than—

The Thellusson Act, 1800.

- (1) The life of the grantor or settlor;
- (2) The term of twenty-one years from the death of the grantor, settlor, or testator;
- (3) During the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mère* at the time of the death of the grantor or testator
- (4) Or during the minority or respective minorities only of any person or persons who under the uses or trusts would for the time being, if of full age, be entitled to the income.

Any accumulation directed contrary to the provisions of the Act is to go to such person or persons as would have been entitled thereto if such accumulation had not been directed.

Sect. 2 of the Act excepts from its operation—

- (a) Any provision for payment of debts of any grantor, settlor, or devisor or other person or persons;
- (b) Any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any conveyance, settlement or devise;
- (c) Any direction touching the produce of timber or wood.

Although the Will contains no express direction to accumulate, yet if an accumulation necessarily takes place by reason of the form in which the property is given the case falls within the Act (b).

It is only the excess beyond the legal period which is bad; the trust for accumulation till then is good (c). Excess only legal.

(b) *Tench v. Cheam*, (1855) 6 De G. & J. 179; *Green v. Gascoyne* (1864) M. & G. 453. 34 L. J. Ch. 268.

(c) *Oddie v. Brown*, (1859) 4 De G.

Four periods
alternative.

The four different periods beyond which the accumulation of income is unlawful under the Act are alternative and not cumulative; therefore when one period has been applied and exhausted, a second period cannot be resorted to and applied, in order to extend the time for accumulation (*d*).

The fourth of the periods is not confined to the minority of persons born in the testator's lifetime (*e*).

Distinction
between
keeping up
and adding to
property.

A direction to accumulate for the purpose of keeping up property, and not to add to it, is not within the restriction imposed by the Act (*f*). Therefore a direction by Will to pay out of the testator's property the premiums upon a policy of insurance on the life of another person, is valid for the whole life insured, and is not an accumulation by the Act restricted to 21 years only (*g*). So a trust for applying rents and profits in payment of ground rents and keeping buildings insured against fire and in tenantable repair is good (*h*); so also a direction for the purpose of keeping on foot a policy of insurance to secure the replacement at the end of a term of the capital that would be lost through not selling leaseholds (*i*).

Gifts not
accelerated by
operation of
Act.

The application of the Act does not accelerate the enjoyment of any gift or disposition contained in a Will. With regard to the excessive accumulations directed the statute makes an *hiatus* between the period when the accumulation ceases by law and the period when the accumulation is directed to cease, and, if there is nothing in the Will that catches the income which arises during that interval of time, the excessive accumulations are undisposed of (*k*). Such income from residuary estate, if the produce of personal estate, will belong to the next-of-kin (*l*), and if the produce of real estate to the heir-at-law (*m*).

Devolution of
excessive
accumula-
tions.

(*d*) *Jagger v. Jagger*, (1883) 25 C. D. 729.

(*e*) *Re Cattell*, [1907] 1 Ch. 567.

(*f*) *Re Gardiner*, [1901] 1 Ch. 697, 700.

(*g*) *Basil v. Lister*, (1851) 9 Hare, 177, and see *Re Gardiner*, *ubi sup.*

(*h*) *Re Mason*, [1891] Ch. 467.

(*i*) *Re Gardiner*, *ubi sup.*

(*k*) *Green v. Gascoyne*, (1864) 34 L. J. Ch. 268.

(*l*) *Oddie v. Brown*, (1859) 4 De G. & J. 179.

(*m*) *Nettleton v. Stephenson*, (1849) 3 De G. & S. 366.

Where the invalid direction is to the income of a legacy, and the residuary estate is settled, the accumulations in excess of the lawful period fall into residue as capital(n).

A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within s. 2 of the Act(o). Provision for payment of debts.

The meaning of the word "portion" as generally understood is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion because it is given to all the children, including the eldest child, and not to younger children generally(p). Meaning of word "portion."

The Accumulations Act, 1892 (55 & 56 Viet. c. 58), prohibits the accumulation of the income of property for the purchase of land only(q), for any longer period than during the minority or respective minorities of any person or persons who under the uses or trust of the instrument would for the time being, if of full age, be entitled to receive the income so directed to be accumulated. Act of 1892 as to accumulation for purchase of land.

It may here be mentioned that the Court will not enforce a trust for accumulation and postponement of the enjoyment of income of an absolute vested gift where the income follows the destination of the fund from which it is derived, and to such a case the Thellusson Act has no application(r). Where destination of income and capital is the same Act has no application.

(n) *Crawley v. Crawley*, (1885) 7 Sim. 427; *Morgan v. Morgan*, (1851) 4 De G. & S. 164; *Re Pope*, [1901] 1 Ch. 64.

(o) *Re Heathcote*, [1904] 1 Ch. 222.

(p) *Re Stephens*, [1904] 1 Ch. 322, 327; *Colquhoun's Trustees v.*

Colquhoun, [1907] S. C. 346, 352.

(q) As to the distinction between a trust to improve land and to purchase land see *Vine v. Raleigh*, [1891] 2 Ch. 13; *Re Gardiner*, [1901] 1 Ch. 697, 700.

(r) *Wharton v. Masterman*, [1895] A. C. 186; *post*, p. 462.

CANADIAN NOTES.

Lapsed bequests fall into the residue. Where there is no residuary clause in the will lapsed bequests create a partial intestacy. *Walsh v. Flemming* (1905), 10 O.L.R. 226. *Re Nevett* (1905), 6 O.W.R. 971. Property devised to executors for a purpose which fails must be distributed by the executors among the next of kin. *Re Estate Alexander McDonald* (1853), 2 N.S.R. 123.

Sec. 36 of the Wills Act, R.S.O., c. 128, which provides that gifts to issue who leave issue shall not lapse, applies only to cases of strict lapse and not to the case of a gift to a class. *In re Sinclair, Clark v. Sinclair* (1901), 2 O.L.R. 349. For instances of the operation of this section see *In re Hannah Hunt* (1903), 5 O.L.R. 197; *In re Williams* (1903) 5 O.L.R. 345; *Re Moir* (1907), 14 O.L.R. 541.

Election.

For a recent and instructive case dealing with the principles of election, see *Mutchmor v. Mutchmor* (1904), 8 O.L.R. 271. See also *King v. Yorston* (1895), 27 O.R. 1; *Kirk v. Kirk*, 40 N.S.R. 147; *Davis v. Davis*, 27 O.R. 532; *Montgomery v. Douglas* (1868), 14 Gr. 268. There have been many Canadian decisions on the widow's election to take under the will or to retain dower. See *Re Hurst* (1905), 11 O.L.R. 6; *Re George Shunk Estate* (1899), 31 O.R. 175; *Davis v. Davis* (1896), 27 O.R. 532; *Reynolds v. Palmer* (1900), 32 O.R. 431; *In re Newborn* (1902), 1 O.W.R. 122; *Elliott v. Morris* (1896), 27 O.R. 485; *McDonald v. Slater* (1907), 4 E.L.R. 263.

A devise or bequest to an attesting witness or to the wife or husband of an attesting witness is void. *Hopkins v. Hop-*

kins (1882), 3 O.R. 223; *Munsie v. Munsie* (1886), 11 O.R. 520; *Farewell v. Farewell* (1892), 22 O.R. 573; *Morrison v. Morrison* (1885), 9 O.R. 223; *In re Maybee* (1904), 8 O.L.R. 601. But where a legatee attested a will as witness, by mistake, and the mistake was discovered at once, there being sufficient other witnesses, the will was re-executed, leaving the beneficiary's name written in the will, apparently as a witness, and the legatee was allowed to take the bequest. *Re Sturgis, Webling v. Van Every* (1889), 17 O.R. 342. And a legacy invalid, because of the legatee's husband being a witness to the will, was held validated by a reviving codicil witnessed by independent persons. *Purcell v. Bergin* (1893), 20 A.R. 535.

A bequest infringing the rule against perpetuities is invalid. *Ferguson v. Ferguson* (1878), 2 S.C.R. 497. *Baker v. Stewart* (1897), 28 O.R. 439. A bequest of an annuity in perpetuity is invalid. *Re Corbit* (1905), 5 O.W.R. 239. The rule against perpetuities does not apply to gifts to charities. *In re Kinney* (1903), 6 O.L.R. 459.

A gift to home missions or to any such good and benevolent Christian objects as the executors considered to be most deserving is not a charitable gift and fails for uncertainty. *Brewster v. Foreign Mission Board* (1900), 2 N.B. Eq. 172.

The doctrine of *cy près* was applied as respects charitable gifts in the *Queen v. Cutler*, Ritchie's Equity Decisions (N.S.) 159; *Re Graham*, 4 O.W.R. 90, and *Attorney-General v. Power* (1902), 35 N.S.R. 526, varied, 35 S.C.R. 182.

A bequest by a member of the Roman Catholic Church of a sum of money to a priest, requesting that masses be said for the repose of the testator's soul, is valid. *Elmsley v. Madden* (1871), 18 Gr. 386.

Mortmain
Act.

The Mortmain Act (9 Geo. II. Ch. 36), seems to have met with a varied reception within the Dominion. It has been declared not in force in New Brunswick (*Ray v. Annual Conference, etc.* (1881), 6 S.C.R. 308), from which it ought to follow that it is not in force in Nova Scotia, nor in Prince Edward Island. It has been held not in force in British Columbia; (*In re Pearse; In re Brabant; Sweetman v. Durien* (1903), 10 B.C.R. 280); but very recently it has been held to be in force in Manitoba. (*Law v. Acton* (1902), 14 Man. L.R. 246.) As to Ontario it was held to be in force in that province and there are many decisions under it. See *McDonnell v. Purcell* (1893), 23 S.C.R. 101. In 1892 the Ontario Legislature enacted under the title "An Act to amend the Law relating to Mortmain," among other sections the following: "Money charged or secured on land or other personal estate arising or in connection with land shall not be deemed to be subject to the provisions of the statute known as 'The Statute of Mortmain or Charitable Uses,' as respects the will of a person dying after the passing of this Act." The Act of 1892 was amended by the Mortmain and Charitable Uses Act, 2 Edw. VII. c. 2 (Ont.). There has also been Ontario legislation in favour of charities validating gifts thereto by wills executed at least six months before testator's death.

As to the present state of the law in Ontario, Lear's Digest has the following note at page 1748, preceding the citation of *Re Barrett*, 25 C.L.T. 357, 10 O.L.R. 337: "Teetzel, J., held that the six months' limitation in these two Acts" (50 Vict. c. 91, Ont., and R.S.O. 1897, c. 307), "must be regarded as having been repealed by the later Mortmain and Charitable Uses Act, R.S.O. 1897, c. 112, passed on the 14th April, 1892, which removes every fetter upon testamentary

power in favour of any charity, subject only to conditions therein mentioned. He was also of opinion that the gift was not of land, as interpreted by s. 3, of c. 112, but of "personal estate arising from or connected with land" within the meaning of section 8. It was argued, however, that, notwithstanding the provisions of c. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least six months before the testator's death, by virtue of section 7, sub-section 6 of that Act. The statute which is now R.S.O., c. 112, was based upon the English Act of 1891, and our later Act of 1902 upon the earlier English Act of 1888, but, by section 1 of the Act of 1902 it was provided that the Act should be read as part of R.S.O. c. 112. The result of this is, as construed by Teetzel, J., to put out two Acts practically in the same position as the two English Acts as determined by *In re Hume* (1895), 1 c. 422, and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances *inter vivos*. See *Re Kinney*, 6 O.L.R. 459, 2 O.W.R. 881."

For a full discussion of the Mortmain Acts and the law regarding "Charitable Uses," see *Re Kinney* (1903), 6 O.L.R. 459. And see *Brown v. Brown* (1900), 32 O.R. 323; *Sells v. Warner* (1896), 27 O.R. 266; *In re Johnson, Chambers v. Johnson* (1903), 5 O.L.R. 459; *Re Youart* (1907), 10 O.W.R. 373; *Re Battershall* (1907), 10 O.W.R. 933.

The Statute of Mortmain, 9 Geo. II. c. 36, is in force in Manitoba, and so much of a \$500 gift to a corporation as was directed to be paid out of land was void, but such proportion of the amount as the pure personalty of the estate bore to the whole estate should be paid subject to abatement. *Re Staebler*, 21 O.A.R. 266, followed. *Law v. Acton* (1902), 14 Man. L.R. 246.

Where the executors were directed to invest the residue of the estate and to apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario, the bequest was held void as opposed to Christianity. *Kinsley v. Kinsley* (1894), 26 O.R. 99.

A devisee of land for a manse is valid under the Religious Institution Act. *Sills v. Warner* (1896), 27 O.R. 266.

In some provinces there are statutes limiting the amount of real property which charitable societies can acquire. See R.S.B.C., c. 16, R.S.M., c. 18. In Nova Scotia there is no such limitation. R.S.N.S., c. 135.

Thelluson
Act.

In *Harrison v. Spencer* (1888), 15 O.R. 692, it was held that the Act against accumulations, commonly called the Thelluson Act (39-40 Geo. III. c. 9), which was passed after the statute 32 Geo. III. c. 1, by which English law was introduced into Ontario, and which did not in terms extend to the colonies, was not in force in Ontario, where the law was as it was in England before that statute. Then that Act was re-enacted. 52 Vict. c. 10, s. 2 (Ont.).

A testator directed his executors to lease and rent and invest his lands, money and mortgages for the term of sixty years, after which the property was to be divided as in his will provided. Held, that this infringed 52 Vict. c. 10, s. 2 (Thelluson Act), and was invalid. *Baker v. Stuart* (1897), 28 O.R. 439.

A provision in a will directing undue accumulation of income for over twenty-one years was held void in *Harrison v. Harrison* (1904), 7 O.L.R. 297.

The rule that where a legacy is directed to accumulate for a certain period or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the

legacy, is not bound to wait until the expiration of that period, but may require the payment the moment he is competent to give a valid discharge applies also where the legatee is a charity. *Re Youart* (1907), 10 O.W.R. 373.

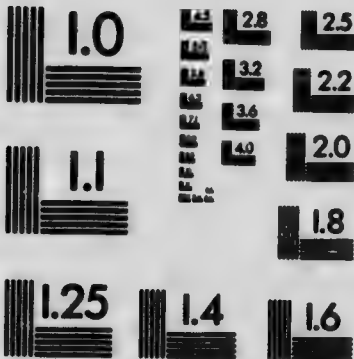
Personal property devised to executors for a purpose which fails, must be distributed by the executors among the next of kin. Such distribution is within the jurisdiction of the Probate Court. *Estate of Alexander McDonald*, 2 N.S.R. 123. In this case the testator left the residue of his personal property "to be disposed of by my executors, as I shall hereafter instruct them to do," but died without leaving any such instructions.

No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. *Lundy v. Lundy* (1895), 24 S.C.R. 650.



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CHAPTER XXXIV.

OF ADEMPMENT AND SATISFACTION.

SECT. 1.—*Of Ademption.*

(1) *Of Specific Legacies.*

Ademption of specific legacy by sale or disposition by testator.

THE general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain in specie as described in the Will; otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed(a).

By change of form so as to alter specification.

Ademption of debt bequeathed by its receipt.

If a debt specifically bequeathed is afterwards received by the testator, the legacy is adeemed because the subject-matter is extinguished(b); and the effect is the same although the testator after receiving the amount laid it out on a new security(c). So also where a testator in his lifetime received and invested money paid on a policy on his wife's life which policy he had specifically bequeathed, the legacy was held to be adeemed(d).

So a specific bequest of stock is adeemed by the sale or payment off of the stock(e).

(a) Williams (10th ed.) 1061.

(b) Badrick v. Stevens, (1792) 3 Bro. C. C. 431; Manton v. Tabois, (1885) 30 C. D. 92, 98.

(c) Gardner v. Hatton, (1833) 6 Sim. 93; Re Bridle, (1879) 4 C. P. D. 336.

(d) Barker v. Rayner, (1826) 2 Russ. 122.

(e) Ashburner v. Macguire, (1786) 2 Bro. C. C. 108, 112; Harrison v. Jackson, (1877) 7 C. D. 339; Re Slater, [1907] 1 Ch. 665.

A partial receipt by the testator of the debt or of the stock specifically bequeathed will operate as an ademption *pro tanto* (f). Partial receipt operates *pro tanto*.

Cases of construction arise as to whether the gift was of the money as invested, or of the proceeds of the fund however invested provided that it is distinguishable from the rest of the estate. In the latter case there would be no ademption by a change of the investment (g). Distinction between gift of money as invested and money however invested.

An alteration in the character of settled property after the date of a Will exercising a power will not prevent the settled property in its altered character from passing (h). A testator, whether he has property of his own or whether he has a power of appointment over property, can if he pleases use a form of words which will give effect to his intention, if he so desire it, that that property, or any money or other property into which it may be changed, shall pass at his death to the object of his bounty. In the simple case of a gift or appointment of particular property, describing it as such, no such question can arise (i).

It has been said that no ademption will take place where the thing specifically bequeathed, without the knowledge of the testator, perhaps against his wishes, or tortiously, has been sold, or its character wholly altered by another person (k). It would seem that there was a time when the Courts held that ademption was dependent on the testator's presumed intention, and it was accordingly held that when a change was effected by public authority, or without the Will of the testator, ademption did not follow. But that has ceased to be law. It is now law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow, unless the testator has at Effect of change of character without the knowledge of testator or independently of his intention.

(f) *Ashburner v. Macguire*, *ubi sup.*

(g) *Morgan v. Thomas*, (1877) 6 C. D. 176, and cf. *Manton v. Tabois*, *ubi sup.*, and see observations of Farwell, J., in *Re Dowsett*, [1901] 1 Ch. 398, 401; *Re Moses*, [1902] 1 Ch. 100, 123.

(h) *Re Moses*, *ubi sup.*

(i) *Re Dowsett*, *ubi sup.* at p. 401.

(k) *Jenkins v. Jones*, (1866) L. R. 2 Eq. 323, 328; and see *Williams* (10th ed.) 1066.

the time of his death substantially the same thing existing, changed only in name or form (*l*).

Pledging
chattels.

As to specific legacies of goods where the disposition of the subject is not absolute, the legacy will not be adeemed: As where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death, so as to enable him to call on the executor to redeem, and deliver it to him (*m*).

Removal of
goods where
locality is
part of
description.

The ademption of a specific legacy of goods will sometimes be effected by the mere removal of them; as where the testator bequeathed all his books at his chambers in the Temple, and afterwards removed his books into the country (*n*); or bequeathed all his goods in a house and subsequently removed them: the general rule being that such description relates to the death of the testator, and if removed they would not pass (*o*). But a mere temporary removal for preservation, as on account of fire, or during a temporary occupancy of a house, would not be an ademption (*p*); nor where it is clear that their locality was not referred to as essential to the bequest (*q*).

Surrender on
grant of new
lease.

A specific bequest of a term of years may be confined to the existing term, in which case the gift would be adeemed by the subsequent surrender of the term, notwithstanding the grant of a new lease (*r*). But the context may show that the testator did not intend to confine its operation to the interest which he had at the date of the Will, and in that case even the subsequently acquired freehold may pass (*s*).

Ademption
applies to
appointments
under powers.

The rule as to ademption applies to appointments under powers. The power must be read with the instrument creating it, and if at the date when the instrument comes into operation either there is no person to take, or there is no

(*l*) *Re Slater*, [1907] 1 Ch. 665, 671.

(*m*) *Williams* (10th ed.) 1067.

(*n*) *Green v. Symonds*, (1730) 1 Bro. C. C. 128, n.

(*o*) *Chapman v. Hart*, (1749) 1 Ves. Sen. 271, 273.

(*p*) *Ibid.*; *Rawlinson v. Rawlinson*,

(1876) 3 C. D. 302.

(*q*) See *Williams* (10th ed.) 1068.

(*r*) *Slatter v. Noton*, (1809) 16 Ves. 197, and see *Williams* (10th ed.) 1069.

(*s*) *Saxton v. Saxton*, (1879) 13 C. D. 359.

property on which the power can operate, the appointment fails. There is no distinction to be drawn between general and specific powers in this respect (t).

(2) *Ademption by Payment in Anticipation.*

(a) *By Testator in loco parentis.*

When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts of a material kind) there is a presumption *primâ facie* that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift *inter vivos* is either wholly or in part a substitution for, or "an ademption" of, the legacy (u).

Subsequent gift *inter vivos* by testator in *loco parentis*.

The principle is that it must be presumed that a father intends equality between the children; and if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is that such advance must be brought into hotchpot, so that the disposition of his fortune, by which he intended to produce equality among the children, may not be altered (x).

Principle founded on presumption of equality.

The rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger. The doctrine of ademption can only be applied between children, against a child in favour of a child, not in favour of a stranger (y).

The doctrine not applied in favour of a stranger.

It was at one time thought that the ademption in such a case would be (*primâ facie*) total, although the amount of the subsequent advancement might be less than that of the legacy, but in *Pym v. Lockyer* (z) the rule was established that when the donor is a parent, or in *loco parentis*, and when

Such ademption only *pro tanto*.

(t) *Re Dowsett*, [1901] 1 Ch. 398; *Re Moses*, [1902] 1 Ch. 100.

(u) *Re Pollock*, (1885) 28 C. D. 552, 555, per Ld. Selborne.

(x) *Meinertzen v. Walters*, (1872)

L. R. 7 Ch. 670, 673, per James, L.J.

(y) *Meinertzen v. Walters*, *ubi sup.*; *Re Heather*, [1906] 2 Ch. 230.

(z) (1841) 5 My. & Cr. 29.

the amount of the subsequent gift is less than that of the legacy, the mere presumption does not go beyond an ademption *pro tanto* (a).

No distinction between bequest of specific amount and of a residue in application of the principle;

The case of *Pym v. Lockyer* having established that there may be ademption *pro tanto*, it followed that there was no reasonable distinction between a bequest of a specific amount and the bequest of a residue, and it was accordingly decided in *Montefiore v. Guedalla* (b) that a bequest of a share of residue for the benefit of a child is subject to ademption in the same way as a pecuniary legacy. Satisfaction by a residue and ademption of a residue for this purpose cannot be distinguished.

nor between gifts of money and of other kind of property.

There would seem to be no principle on which a distinction can be drawn for the purpose of considering what is a portion between a gift of money and a gift of any other kind of property, and the cases show that gifts of shares of residue, of shares in partnership property, and of real estate have been considered and treated as portions (c).

Whether gift was intended as ademption depends on all the circumstances.

In considering whether an advance is to be considered as a portion and an ademption of a portion under a Will, the whole of the circumstances and manner of the gift must be looked at (d). If a child were in business and required further capital, a sum given for that purpose would be an advancement, but a sum given merely to assist him temporarily would not. So in *Taylor v. Taylor* (e) a father who had paid a sum of £650 to extricate his son from debts of honour in India was treated by Jessel, M.R., as having thus made a gift to his son, and not an advancement by way of portion; and so it was held in *Re Scott* (f) with regard to payment of £1,500 to a son to release him *pro tanto* from a debt which might have been enforced against him by mortgagees if the father had not come forward with his assistance.

(a) Per Ld. Selborne in *Re Pollock*, *ubi sup.*

(b) (1860) 1 De G. F. & J. 93, 100.

(c) *Re Lacon*, [1891] 2 Ch. 482, 487, per Eomer, J.

(d) *Ravenscroft v. Jones*, (1864) 4

De G. J. & S. 224, 228, per Knight-Bruce, L.J.

(e) (1875) L. R. 20 Eq. 153.

(f) [1903] 1 Ch. 1, approving *Taylor v. Taylor*, *ubi sup.*

Parol evidence is admissible in such cases for the purpose of showing what the testator meant by the act subsequent to the Will. The parol evidence is not receivable as evidence of revocation or alteration of any part of the Will, but as evidence of a transaction whereby the legatee has received the legacy, or part of the legacy, by anticipation (g).

Parol evidence admissible.

If the presumption of law against double portions, provided by a person *in loco parentis*, be attempted to be rebutted by parol evidence, it may be supported by evidence of the same kind; and the declarations of the person *in loco parentis* are admissible in evidence upon the question of his intention (h).

Parol evidence admissible both to rebut and support presumption.

The existence of a codicil executed after the advancement and expressly confirming the Will giving a legacy, but containing no reference to it, is a fact which cannot be left out of consideration, but is not decisive of the question (i).

Subsequent codicil confirming Will not conclusive.

In order to establish a case for the application of the rule as to double portions both of the suggested gifts or portions must be gifts in the nature of a portion (k). The presumption will not prevail where the testamentary portion and subsequent advancement are not *ejusdem generis*; or where the subsequent advancement depends upon a contingency and the testamentary portion is certain; or where a legacy or advancement is not merely given as a portion but is expressed to be made in lieu of, or compensation for, an interest to which the child was entitled (l).

Both gifts must be in nature of portions.

The application of the principle of ademption will not be prevented by the circumstance that the limitations of the portion under the Will are widely different from the limitations of the portion under the settlement (m). In this respect there is a distinction between the principle of ademption of legacies given as portions and that of the satisfaction of debts

Effect of differences in the limitation of gifts.

(g) *Kirk v. Eddowes*, (1844) 3 Hare, 509; and see *Williams* (10th ed.) 1074.

(h) *Powys v. Mansfield*, (1837) 3 My. & Cr. 359.

(i) *Ravenscroft v. Jones*, *ubi sup.*;

Re Scott, *ubi sup.*

(k) *Re Lacon*, [1891] 2 Ch. 482, 498, per Bowen, L.J.

(l) *Williams* (10th ed.) 1073.

(m) *Durham v. Wharton*, (1835) 3 CL & F. 146, 154.

by legacies (n). Accordingly, where a father makes an absolute gift by Will of a certain sum to a daughter and afterwards takes upon himself to make a settlement upon her marriage of a like sum on her and her husband and children, the variance between the provisions of the Will and those of the settlement affords no argument against the portion being a satisfaction of the legacy, and the provision by the settlement is an ademption of the legacy (o). And so where a legacy is given to M., with a contingent limitation over to N. in the event of M. dying without children, if the legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testator, to which no limitation in favour of N. is attached, the legacy is not merely adeemed as to M., but also extinguished as to N. (p).

What constitutes standing in *loco parentis*.

Mothers, uncles, great-uncles, grandfathers or grandmothers, or putative fathers, are not to be considered in *loco parentum* unless they have intended to assume the office and duty of a parent. But a person may stand in *loco parentis* to a child, though the child resides with and is maintained by his father (q). Parol evidence is admissible to prove that a person meant to put himself in *loco parentis* to a child, so far as relates to the child's future provision; and evidence of his declarations, as well as the acts of such a person, are admissible for that purpose (r).

(b) Of Legacies bequeathed for a Particular Purpose.

Effect of subsequent gift to stranger for same purpose as legacy.

The presumption arising out of the parental or assumed parental relation does not extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the Will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar

(n) See Williams (10th ed.) 1072, and *post*, p. 456.

(o) Barry v. Harding (1844), 1 J. & L. 475, 492.

(p) Twining v. Powell, (1845) 2 Coll. 262.

(q) Williams (10th ed.) 1077.

(r) Powys v. Mansfield, *ubi sup*.

presumption is raised *prima facie* in favour of ademption. And it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not), may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine it is not necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist. A case of this kind comes very near in principle to the first class of cases in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended (*s*).

Although no particular purpose is referred to in the Will, yet it may be shown that the legacy was given for a purpose, as for payment or satisfaction of a debt, and if the debt is paid off in the testator's lifetime his estate is relieved from payment of the legacy (*t*).

Legacy given to satisfy debt subsequently discharged in testator's lifetime.

So it may be shown that a legacy given by Will of a sum of money by a mother, or person not *in loco parentis*, is adeemed by payment or appointment by the testatrix in her lifetime of a sum of money to the legatee in anticipation (*u*).

There would seem to be no authority that a mere legacy to A. in trust for the benefit of B., an infant, is a legacy for a particular purpose within the rule, and it was accordingly held

What is a particular purpose.

(*s*) *Re Pollock*, (1885) 28 C. D. 552, 556, per *Ld. Selborne*.

(*t*) *Re Fletcher*, (1887) 38 C. D. 373.

(*u*) *Re Ashton*, [1898] 1 Ch. 142.

in *Re Smythies* (x) that a legacy to a trustee for the benefit of an infant, to whom the testator is not *in loco parentis*, is not given for a particular purpose so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose.

A legacy to the trustees of the endowment fund of a hospital, not for the general purposes of the hospital, is a legacy for a particular purpose, and is therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime (y).

SECT. 2.—Of Satisfaction of Debts and Portions by Legacies.

(1) Satisfaction of Debts by Legacies.

Bequest by the debtor of legacy equal to or exceeding debt presumed to be in satisfaction.

Where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, it will be presumed, in the absence of evidence of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt (z).

Judges, however, have frequently expressed their disapproval of this rule, and the Courts have laid hold of slight circumstances to get out of it (a).

What is sufficient to rebut presumption.

The presumption is rebutted if the debt was contracted after the date of the Will, or if the debt is due on a current account, or upon a bill of exchange or other negotiable instrument; or if the legacy is contingent, or uncertain as to amount, as if it is the whole or part of a residue, or if the legacy is merely a life interest, or being an absolute legacy payment is deferred (b).

Neither the fact that the legacy is not payable under the ordinary law until one year after the death of the testator, nor the appointment of the legatee as executor, takes the case out of the general rule (c). But a legacy as to which no time was fixed for payment has been held not to be a satisfaction of a debt payable within three months of the testator's death,

(x) [1903] 1 Ch. 261.

(y) *Re Corbett*, [1903] 2 Ch. 326.

(z) Williams (10th ed.) 1041; *Re Rattenberry*, [1906] 1 Ch. 667, 670.

(a) *Re Horlock*, [1895] 1 Ch. 516,

518.

(b) Williams (10th ed.) 1042; *Crichton v. Crichton*, [1895] 2 Ch. 853.

(c) *Re Rattenberry*, *ubi sup.*

owing to the difference in the times at which the legatee was entitled to call for payment (*d*).

A direction by a testator that his debts are to be paid is sufficient, without the further direction to pay legacies, to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt (*e*).

A further exception may be found in cases where the legacy and debt are of a different nature; as where the testator is indebted by bond, and bequeaths an interest in land to his creditor (*f*); or where the legacy is of chattels (*g*); or where the testator had money in his hands as trustee for a person for life and then for children, and made a gift of like amount to the tenant for life absolutely (*h*).

A legacy by parent to child, or by husband to wife, is subject to the same general rule as to the legacy being meant as a satisfaction of a debt (*i*).

Parol evidence is admissible to show whether or not the testator intended the legacy to be in addition to the debt (*k*).

Rule applies to legacy by parent to child or by husband to wife.

Parol evidence admissible.

(2) Satisfaction of Portions by Legacies.

Equity leans against double portions, and the general rule is that wherever a legacy given by a parent, or a person standing *in loco parentis*, is as great as or greater than a portion previously secured to the legatee upon marriage or otherwise, a presumption arises that the legacy was intended as a satisfaction of the portion. If the legacy is less than the portion, a presumption arises that it was intended as a satisfaction *pro tanto* (*l*).

Presumption against double portions.

A share of residue is on the same footing as a pecuniary legacy as regards the rule against double portions (*m*).

Where there is a covenant with trustees to pay a sum to

Election by one of several cestuis que trust.

(*d*) *Re Horlock*, *ubi sup.*

(*e*) *Re Huish*, (1889) 43 C. D. 260.

(*f*) *Williams* (10th ed.) 1043.

(*g*) *Byde v. Byde*, (1761) 1 Cox, 44, 49.

(*h*) *Fairer v. Park*, (1876) 3 C. D. 309.

(*i*) *Williams* (10th ed.) 1045.

(*k*) *Re Horlock*, *ubi sup.*

(*l*) *Re Blundell*, [1906] 2 Ch. 222, 226; and see *Williams* (10th ed.) 1045.

(*m*) *Thyrle v. Earl of Glengall*, (1848) 2 H. L. Cas. 131.

them to be held in trust for persons in succession, a legacy given to one or more of the *cestuis que trust* may operate as a satisfaction of the covenant so far as the legatees are concerned, without satisfying the covenant so far as the other *cestuis que trust* are concerned, who are not legatees. The election of one of the *cestuis que trust* to take under the Will cannot affect the rights of the other covenantees who take no interest under the Will (n).

Presumption
founded on
intention.

The question whether a gift in a Will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a Will, is one of intention. The rule that there is a presumption against double portions is founded on the presumption that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the Will precedes the settlement than where the settlement precedes the Will. In the latter case, the intention to satisfy a covenant must be distinctly expressed or clearly indicated. Great differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the Will was not meant in satisfaction of the covenant. Where, too, the gift by the Will is not to the child, but to trustees to pay debts and legacies and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared (o). No positive rule has been or can be laid down as to what is sufficient to rebut the *prima facie* presumption against double portions (p).

Parol evi-
dence admis-
sible to rebut
presumption.

Parol evidence of intention is admissible to rebut the presumption against double portions, since parol evidence is always admissible to rebut, but not to raise, a presumption (q).

(n) *Re Blundell*, *ubi sup.*

(o) *Chichester v. Coventry*, (1867) L. R. 2 H. L. 71.

(p) *Ibid.*; and see *Montague v. Earl of Sandwich*, (1885) 32 C. D.

525; *Cartwright v. Cartwright*, [1903] 2 Ch. 306.

(q) *Re Tussaud's Estate*, (1878) 9 C. D. 363.

SECT. 3.—*Of Release of Debts by Legacies.*

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt, if any exist, are found uncanceled among the testator's property, the Courts of Equity do not consider the legacy to the debtor as necessarily, or even *prima facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release: And if such intention does not appear clearly expressed or implied on the face of the Will, evidence from other sources will be admitted (r).

Bequest by creditor of legacy to debtor no release of debt in absence of intention.

Parol evidence of intention admissible.

SECT. 4.—*Of Satisfaction of Debts out of Legacies.*

A legatee is not entitled to receive, out of the estate of his testator, any part of the bounty intended for him by the testator, until the legatee has paid all his own obligations in the shape of debts owing to the testator's estate (s).

Principle that legatee cannot receive any bounty under Will until debt owing by him to the estate is satisfied.

The principle would seem to be that a person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his hand a part of the mass, which, if the mass were completed, he would receive back (t). Consequently the principle cannot apply to specific devisees, or legatees of chattels real, or of a specific chattel (u). But the principle will be applied in the case of a specific legatee, if the legacy be represented by money in the hands of the executor (v).

Principle does not apply to specific devisees, or to specific legatees unless legacy represented by money in hands of executor.

A legacy or share immediately payable cannot be retained to meet a debt payable at a future time (x).

(r) Williams (10th ed.) 1048.

(s) Lindley on Partnership (7th ed.) 682; Williams (10th ed.) 1049.

(t) *Re Akerman*, [1891] 3 C. 212, 219; *Re Bruce*, [1908] 1 Ch. 850.

(u) *Re Akerman*, *ubi sup.*

(v) *Re Taylor*, [1894] 1 Ch. 671.

(x) *Re Akerman*, *ubi sup.*, *Re Abraham*, [1908] 2 Ch. 69.

Effect of
bankruptcy
of legatee.

The principle does not apply to the case of a legatee who became bankrupt before the death of the testator (*y*); but it will apply if the debtor became bankrupt after the death of the testator (*z*), unless the executors have proved in the bankruptcy, or are bound by a composition deed to which the statutory majority of the creditors have assented, in which case the principle would apply only to the dividend, or amount of the composition (*a*).

SECT. 5.—*Of the Effect of appointing Debtor to be Executor.*

Appointment
of executor
being a volun-
tary act
released debt
at law.

At law an appointment by the testator of his debtor, whether he was a sole debtor or one of several joint debtors, or even one of joint and several debtors, his executor, operated as a release or extinguishment of the debt; the principle being that a debt is merely a right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment by the creditor to that office suspended the action for the debt: and where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged (*b*). But this doctrine did not apply so as to defraud creditors of their just debts, and therefore the debt due from the executor was considered, on their behalf, as assets in his hands. And in the case of administration granted to the debtor, the remedy being suspended by act of law and not by the voluntary act of the creditor, it was held to be only temporarily suspended and might be enforced by an administrator *de bonis non* (*c*).

Grant of ad-
ministration,
being act of
law, suspends
only the
remedy.

However, in equity the debt is general assets, not only for the payment of the testator's debts, but also of his legacies; and there is also a trust for the residuary legatee, or next-of-kin, as the case may be (*d*).

In equity
debt general
assets for
legatees as
well as
creditors:

But in equity, if the rights of creditors are not interfered with, evidence is admissible to show an intention of the

unless con-
trary inten-
tion proved.

(*y*) *Cherry v. Boulton*, (1830) 4 My. & C. 442; *Re Hodgson*, (1878) 9 C. D. 673.

(*z*) *Re Watson*, [1896] 1 Ch. 925.

(*a*) *Ibid.*, at p. 933; *Re Orpen*,

(1880) 16 C. D. 202.

(*b*) *Williams* (10th ed.) 1054.

(*c*) *Ibid.*

(*d*) *Ibid.*, 1057.

testator to forgive the debt, and then the operation of the appointment of his debtor as executor would complete his title and release the debt(e), although he may never prove the Will(f).

SECT. 6.—*Of the Effect of appointing Creditor to be Executor.*

If the debtor makes his creditor, or the executor of his creditor, his executor, this alone is not an extinguishment of the debt, but if the executor has assets which he may retain to pay himself, it is an extinguishment, for the having assets amounts to payment(g).

Debt only
extinguished
on principle
of retainer.

(e) *Re Applebee*, [1891] 3 Ch. 422; *Re Griffin*, [1899] 1 Ch. 408.

(f) *Re Applebee*, *ubi sup.* So also an imperfect gift *inter vivos* may be perfected by the donor appointing the donee executor:

Strong v. Bird, (1874) L. R. 18 Eq. 315; *Re Stewart*, (1908) W. N. 147; and see *ante*, p. 298.

(g) *Wankford v. Wankford*, (1698) 1 Salk. 299, 305.

CANADIAN NOTES.

The doctrine of ademption has recently been discussed and applied in *Tuckett-Lawry v. Lamoureux* (1902), 3 O.L.R. 577.

A testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his lands to his brothers, on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and made them his executors. It was held that at law the legacy could not be considered as a satisfaction of the annuity in the bond, and that the mother was entitled to both. *Cole v. Cole*, 5 U.C.Q.B. (O.S.) 744.

Where land, devised subject to a life estate and charged with the payment of legacies, is sold after the death of the testator at the instance of the mortgagee, the money remaining after the payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatee will be paid ratably after the value of the life estate has been ascertained. *Armson v. Thomson* (1877), 25 Gr. 138.

A testator, having covenanted in a separation deed to pay his wife \$200 a year during her lifetime, in lieu of maintenance, alimony and dower, by his will, subsequently made, gave her \$400 a year in lieu of dower. Held, that as the legacy was given in lieu of dower it was not intended to be a satisfaction of the covenant. *Carscallen v. Wallbridge* (1900), 32 O.R. 114.

A testator bequeathed to W. L. £1,500 "due to me by R. C. and secured by mortgage." After the making of this will and in testator's lifetime, R.C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this and other property, and a covenant to pay the amount, retaining the

mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for the debt. The testator died without altering his will in regard to this legacy. Held, that the legacy was not adeemed. *Loring v. Loring* (1865), 12 Gr. 103. And see *Miller v. Miller* (1877), 25 Gr. 224; *Re Dods* (1901), 1 O.L.R. 7; *Severn v. Archer* (1893), Cas. Dig. 875.

On a question of ademption parol evidence will be admissible. *Tuckett-Lawry v. Lamoureaux* (1902), 3 O.L.R. 577.

A bequest of promissory notes upon which, after making his will, the testator has recovered judgment which was unsatisfied at the time of his death, does not pass the notes. *Wetmore v. Ketchum* (1862), 10 N.B.R. 408.

As to discharge of debtor, where testator appointed him executor, see *Johnson v. Mackenzie*, 6 U.C.Q.B. 544.

As to discharge of estate of a deceased surety, under special circumstances, where he appointed the debtor one of his executors, see *Austin v. Gibson* (1879), 4 A.R. 316.

CHAPTER XXXV.

OF VESTED, CONTINGENT, AND CONDITIONAL LEGACIES.

SECT. 1.—*Of Legacies whether Vested or Contingent.*

Future time
for payment
expressed.

WHEN a future time for the payment of a legacy is defined by the Will, the legacy will be vested or contingent, according as, upon construing the Will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it(a).

Gift payable
at a deter-
minate future
time confers
immediate
vested
interest.

In ascertaining the intention of the testator in this respect, Courts of Equity have established two positive rules of construction; 1st. That a bequest to a person payable or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in presenti solvendum in futuro*, and transmissible to his executors or administrators; for the words "payable" or "to be paid" are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time. 2nd. That if the words "payable" or "to be paid" are omitted, and the legacies are given "at twenty-one," or "if," "when," "in case," or "provided," the legatees attain twenty-one, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment, Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy(b).

But words
such as "at
21," or "if,"
"when," or
"in case," or
"provided,"
the legatee
attains 21 or
other future
period make
gift contin-
gent.

(a) Williams (10th ed.) 971.

(b) See Williams (10th ed.) 971 et

seq., where the above rules are stated
and illustrated by decided cases, and

In the case of a particular legacy, where interim interest is given, it is presumed that the testator meant an immediate gift, because for the purpose of interest the legacy is to be immediately separated from the bulk of the property (c). And it is now a well settled rule of construction that where there is a gift by Will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent (d).

Effect of giving interim interest.

But where a testator gives residue to several persons on their attaining twenty-one in equal shares, and directs the income of the whole fund during their respective minorities to be applied for the maintenance of all indiscriminately, the gift will not be vested (e).

There would seem to be no absolute rule of construction arising on a direction to apply the whole income for maintenance "at the discretion of trustees or otherwise," but in each case the whole frame of the Will must be looked at to ascertain whether the gift is of the interest for maintenance or a gift of maintenance out of interest (f).

The use of such words as "pay and transfer" as the only words of gift in a deferred bequest, does not make such bequest contingent. The true criterion is, what was the reason for the postponement? If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent (g).

Effect of direction to pay and transfer at a future time without any direct gift.

A devise of real estate to a devisee "when she shall attain the age of twenty-five years" without more is contingent on

Gift over as indicating vested interest subject to be divested.

also cases showing how the intention will be controlled by the context; see also *Re Couturier*, [1907] 1 Ch. 470, 472, where the principles are stated by Joyce, J.

(c) *Vawdry v. Geddes*, (1830) 1 Russ. & My. 203, 208.

(d) *Re Gosling*, [1903] 1 Ch. 448.

(e) *Re Parker*, (1880) 16 C. D. 44;

and see *Re Gosling*, [1902] 1 Ch. 945, reversed on appeal on point of construction.

(f) See Williams (10th ed.) 984, n. (w); and see *Re Williams*, [1907] 1 Ch. 180.

(g) *Re Bennett's Trust*, (1857) 3 K. & J. 280.

her attaining that age (*h*). But if there is a gift over on the devisee dying under age it would seem that is sufficient to show the testator intended the devisee to take a vested interest subject to be divested on a future contingency (*i*).

Legacy "as soon as," etc., with interest, contingent both as to principal and interest.

Effect of direction to accumulate following absolute vested gift.

Effect of gift absolute followed by qualifying trusts which fail.

Deferred legacies payable out of real estate only.

A legacy to A., as soon as he attains the age of twenty-one years, with interest, is contingent, as well as regards the interest as the principal, and there is no gift either of principal or interest until the legatee attains twenty-one (*k*).

Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee; in other words the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit (*l*).

Where there is an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin as the case may be (*m*).

But if there is an absolute gift, and then a clause (whether in a subsequent part of the Will or by codicil), not merely modifying the enjoyment by the legatee, but diminishing the estate originally given to him, then the absolute gift has in effect been cut down, and the Court can only give effect to it so diminished (*n*).

The rule as to vesting of legacies payable out of personal estate, which was introduced from the civil law, does not apply to legacies payable out of real estate, which are governed by the common law of England, according to which if a sum of money is given to a person charged upon real estate, and is made payable at a certain age, at marriage, or other event

(*k*) *Re Francis*, [1905] 2 Ch. 295.

(*i*) *Phipps v. Ackers*, (1842) 9 Cl. & F. 583.

(*h*) *Knight v. Knight*, (1826) 2 Sim. & St. 490.

(*l*) *Wharton v. Masterman*, [1895] A. C. 186.

(*m*) *Hancock v. Watson*, [1902] A. C. 14.

(*n*) *Re Wilcock*, [1898] 1 Ch. 95, 98.

personal to the party to be benefited, and such party dies before the time arrives, the portion or legacy is not to be raised out of the land, but it sinks into it (*o*); and the rule is the same although interest on the sum is given in the meantime (*p*). But if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raisable after the death of the tenant for life notwithstanding the death in the meantime of the party to be benefited (*q*).

The rules as to vesting which apply to legacies charged on land do not, however, apply to legacies given out of moneys to arise from the sale of land (*r*).

Legacies payable out of proceeds of sale of land.

Where legacies are charged on both real and personal estate, the personal estate is considered the primary fund for their payment (*s*), and so far as the personal fund will extend the same rules apply as if the legacies were payable out of personal estate only; and so far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on the real estate only (*t*).

Legacies charged on both real and personal estate.

But where the proceeds of realty and personalty are directed as a mixed fund to be applied to the same object, it would seem that this indicates an intention that the same rules shall apply to both, and in that case the rules applicable to personalty apply (*u*).

Legacies payable out of proceeds of realty and personalty as a mixed fund.

Where in a Will there are successive limitations of personal estate in favour of several persons absolutely, the first of those who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and

Effect of successive limitations of personalty to persons absolutely.

(*o*) *Evans v. Scott*, (1847) 1 H. L. C. 43, 57; *Parker v. Hodgson*, (1861) 1 Dr. & Sm. 568, 573; *Henty v. Wrey* (1882) 21 C. D. 332, 355.

(*p*) *Parkin v. Hodgson*, *ubi sup.* *Henty v. Wrey*, *ubi sup.* at p. 357.

(*q*) *Evans v. Scott*, *ubi sup.*

(*r*) *Re Hart's Trusts*, (1858) 3 De G. & J. 195, 203.

(*s*) See *ante*, p. 407.

(*t*) *Williams* (10th ed.) 1002.

(*u*) *Genery v. Fitzgerald*, (1822) Jac. 468.

had taken; the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift (x).

Effect of bequest to a person "and in case of his death" to another.

A bequest to a person, "and in case of his death" to another, is an absolute bequest to the first legatee, if he survives the testator. Where there is no antecedent estate the contingency is referred to death in the lifetime of the testator; and when the gift is preceded by a life estate the contingency has reference to the death of the donee, either during the preceding life estate or in the lifetime of the testator. But where the gift over is not on a certain event, as where death is coupled with the contingency of not leaving issue, there is no necessity for limiting the event to the testator's lifetime or the preceding life estate, as the case may be (y).

Effect of gift and in case of death without leaving issue.

Effect of Conveyancing Act, 1882, s. 10 (1), as to executory limitations over.

As to executory limitations contained in any instrument coming into operation after the 31st December, 1882, sect. 10 (1) of the Conveyancing Act, 1882, provides as follows: "Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life with an executory limitation over in default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect."

SECT. 2.—Of Conditional Devises and Bequests.

(1) Impossible Conditions Precedent.

Distinction between devises of realty and bequests of personalty.

As regards devises of realty, which are regulated by the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void (z).

Impossible condition precedent to a devise renders devise void.

(x) *Re Lowman*, [1895] 2 Ch. 348.
(y) *O'Mahoney v. Burdett*, (1874) L. R. 7 H. L. 388; *Re Parry & Daggs*, (1885) 31 C. D. 130, 133; and see *Re*

Schnadhorst, [1901] 2 Ch. 338; [1902] 2 Ch. 234.

(z) *Williams* (10th ed.) 1008.

As regards legacies which are regulated by the civil law, adopted by Courts of Equity, if a condition precedent to the vesting of a legacy is impossible, the bequest is discharged of the condition; and the legatee is entitled as if the legacy were unconditional (a).

Impossible condition precedent to a bequest is nugatory.

Where there is a condition precedent to the vesting of the interest of a devisee, and on his failing to perform the condition the property is given over, the condition must be complied with strictly. If it is not so complied with, the property vests in the person in whose favour the gift over is made, and the Court cannot interfere to set up the prior gift (b).

Performance of condition precedent to devise.

With regard to the performance of conditions precedent relating to legacies, according to the civil law, adopted by Courts of Equity, where a *literal* compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with, as nearly as it practically can be, or, as it is technically called, *cy-près* (c). The failure of matters ancillary to the accomplishing of the testator's object may, it would seem, be disregarded (d). The rule of the Court is that if the Court can put the parties in the same situation as if the condition had been performed, it will not suffer a forfeiture to attach (e).

Performance of condition precedent to bequest.

Failure of matters ancillary to testator's object may be disregarded.

If the performance of the condition appears to be the motive of the bequest, and the impossibility of the condition was unknown to the testator, as where a legacy is given on condition the legatee marries the testator's daughter, who happens to be then dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the Will, but dies before the marriage can be solemnised; the impracticability of the performance will be a bar to the claim of the legatee (f).

Effect of performance of condition being the motive of the bequest.

(a) Williams (10th ed.) 1008.

(b) *Ibid.*, 1013; and see Egerton v. Earl of Brownlow, (1853) 4 H. L. C. 1, 18, n. per Ld. Cranworth.

(c) Story, Eq. Jur. s. 291.

(d) See Williams (10th ed.) 1013.

(e) Hollinrake v. Lister, (1826) 1 Russ. 500, 508.

(f) Williams (10th ed.) 1008; and see Yates v. University College of London, (1875) L. R. 7 H. L. 438.

Time observ-
ance may be
material.

Time observance may be material to the due performance of a condition, as where the condition is that the legatee shall within a time specified personally apply for his legacy (*g*), or where the condition is that the legatee shall establish his title within a certain time (*h*).

Legatee's
ignorance of
condition no
excuse.

The performance of the condition is not excused by the ignorance of the legatee, the principle being that a person who takes by gift under a Will cannot plead want of knowledge of the contents of the Will as an excuse for not complying with its provisions (*i*).

Executor
owes no duty
to legatee to
give notice.

The executor owes no duty to the legatee to give notice of the terms of the legacy, even though he takes a beneficial interest in the legacy on the breach of the condition (*k*).

(2) *Impossible Conditions Subsequent.*

Impossible
condition sub-
sequent void
notwith-
standing gift
over.

Where a condition subsequent is impossible, it is the doctrine as well of the common law as of the civil law that the condition is void, and the legacy single and absolute; and if the performance of the condition subsequent be rendered impossible by the act of God, the gift to which the condition is attached is good, even though there is a gift over on non-performance of the condition (*l*).

Construction
of conditions
subsequent.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction (*m*). Whether a condition is to be construed as precedent or subsequent must depend on the intention of the testator to be collected from the whole instrument (*n*).

In many cases the Courts have regarded apparent conditions as conditional limitations and construed them as having been substantially complied with by the event which has actually

(*g*) Williams (10th ed.) 1014; Powell v. Rawle, (1874) L. R. 18 Eq. 248.

(*h*) *Re Hartley*, (1887) 34 C. D. 742.

(*i*) Astley v. Earl of Essex, (1874) L. R. 18 Eq. 290.

(*k*) *Re Lewis*, [1904] 2 Ch. 656.

(*l*) Williams (10th ed.) 1009; *Re Greenwood*, [1903] 1 Ch. 749; *Re Croxon*, [1904] 1 Ch. 252.

(*m*) *Re Greenwood*, *ubi sup.*

(*n*) *Egerton v. Earl of Brownlow*, (1853) 4 H. L. C. 1, 157.

happened, so that since the first limitation cannot take place the subsequent one shall. For instance, a devise on condition that the devisee should give a release within three months after the testator's death, and if he should neglect to give such release then (ver, and the devisee died in the testator's lifetime; it was held that this was a conditional limitation and that the devise over took effect (o).

With regard to conditions subsequent, the general rule is that they are to be construed with great strictness, as they go to divest estates already vested: Therefore the very event must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy (p). Moreover the ceaser and the limitation over must fit in with one another, and if there is no person to take under the limitation over the clause is void (q).

(8) *Illegal Conditions Precedent.*

With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se*, as to kill A., burn his house, or the like, then both by the common and civil law not only the condition but the bequest itself is void. But where the illegality consists merely in the performance of the condition being against a rule or the policy of the law, there although by the common law the devise as well as the condition is equally void as if there existed *malum in se*, by the civil law the condition only is void, and the bequest single and good. Thus, where the testator bequeathed to his niece £2 a month if she lived with her husband, and £5 a month if she lived apart from him, Lord Northington was of opinion that she was entitled to the £5 a month payment; for the condition being *contra bonos mores*, the bequest was single (r).

Illegal condition precedent, *malum in se*, renders bequest void.

Condition merely contrary to rule of law renders devise void: but in same case the condition of bequest alone is void.

(o) See Williams (10th ed.) 1014 *et seq.*, where other instances of the application of this principle are given, and see Egerton v. Earl of Brownlow, *ubi sup.*, at p. 223.

(p) Williams (10th ed.) 1017; Harrison v. Foreman, (1800) 5 Ves.

207.

(q) Musgrave v. Brooke, (1884) 26 C. D. 792; *Re Cornwallis*, (1886) 32 C. D. 388.

(r) Williams (10th ed.) 1009; and see *Re Moore*, (1888) 39 C. D. 116.

(4) *Illegal Conditions Subsequent.*

Illegal condition subsequent is void and devise or bequest is good.

Where the performance of a condition subsequent is illegal, then, as well at the common law as by the civil law, adopted in the Courts of Equity, the condition is void and the devise or bequest freed from it, as though it had been given unconditionally (s). On this principle, a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is, as being contrary to public policy, void (t).

So also an original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect; as by a gift over which is void by reason of being too remote (u).

The remoteness against which the rule for prevention of perpetuities is directed is remoteness in the commencement, or first taking effect, of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period may be so limited as to determine on the happening of any event, however remote, as, for example, the indefinite failure of issue of a person, which is too remote a contingency for the commencement of limitations. But an estate can only be made to determine upon an event thus remote when, by its original form and limitation, it will regularly cease by the happening of the contingency, as the term of the duration of the estate: for a power reserved to a person to determine the limitation on such remote event would be void (x). It follows that under powers in an antenuptial settlement a life interest may be limited to any child of the marriage until the happening of an event, for instance, until he becomes a member of the Roman Catholic Church (y), or so long as he should be living and unmarried, but a gift

(s) Williams (10th ed.) 1010; Eger-ton v. Earl of Brownlow, (1853) 4 H. L. C. 1, 160; and see *Re Moore*, *ubi sup.*

(t) *Re Beard*, [1908] 1 Ch. 383.

(u) Williams (10th ed.) 1010; Ring

v. Hardwick, (1840) 2 Beav. 352.

(x) Lewis on Perpetuity, p. 173; *Wainwright v. Miller*, [1897] 2 Ch. 255, 261.

(y) *Wainwright v. Miller*, *ubi sup.*

over to other children of the marriage should the child marry would be void for remoteness, as the class is not necessarily ascertainable within twenty-one years after the death of the survivor of the appointors (s).

Again a condition is void which is inconsistent with and repugnant to the gift, as for instance restraining its alienation (a), and the law is the same both as to real and personal estate.

Condition repugnant to absolute gift.

But although a condition restraining alienation is void, yet property may be given to a man for his life, with a condition so expressed as to amount to a limitation determining the life estate in the event of alienation, and in that case neither the donee nor his assignees can have it beyond the period limited (b).

Condition restraining alienation.

Where a life interest is given subject to forfeiture if the tenant for life should charge or incumber the property, and there is a gift over, for instance in favour of children, on such forfeiture, a forfeiture will be produced by a charge or incumbrance, notwithstanding that, in the event which happens of there being no children, there is no person to take under the gift over (c).

Where the words of the proviso for forfeiture on bankruptcy are words of futurity, the forfeiture does not take place if the bankruptcy has been annulled before the first payment becomes due, or in other words before any right to receive the income in question has accrued to the trustee in the bankruptcy (d).

Forfeiture in the event of bankruptcy.

A forfeiture clause in a Will, providing that in the event of alienation or bankruptcy the interest of the legatee under the Will shall cease and go over, applies to a bankruptcy either before or after the date of the Will and existing at the

(s) *Re Gage*, [1898] 1 Ch. 498.

(a) *Bradley v. Peixoto*, (1797) 3 Ves. 325; *Re Roher*, (1884) 26 C. D. 801; *Re Dugdale*, (1888) 38 C. D. 176, 180.

(b) *Brandon v. Robinson*, (1811) 18 Ves. 429, 433; *Re Machu*, (1882) 21 C. D. 838, 842.

(c) *Hurst v. Hurst*, (1882) 21 C. D. 278.

(d) *Re Parnham's Trusts*, (1876) 46 L. J. Ch. (N. S.) 80, 413; *Robertson v. Richardson*, (1885) 30 C. D. 623, 628; *Re Loftus-Otway*, [1895] 2 C. D. 225.

testator's death (e). But this rule ought not to be applied to any but those particular acts of forfeiture, and ought not, in the absence of express words, to be extended to other acts of forfeiture, as for instance a marriage of a kind forbidden by the testator (f).

Absolute interest may be given over before time of possession.

Gift over if donee dies without disposing of the property is void.

Effect of want of gift over.

An absolute interest in personalty, whether vested or contingent, may be given over upon alienation before the time of possession (g).

If there is an absolute bequest of property, with a proviso that if the legatee dies without having disposed of it by Will, or otherwise, his interest in it shall cease and it shall go over to another, the gift over is void and the legacy absolute, since it is an attempt to alter the course of devolution at the moment of devolution and at no other time (h), and there is no distinction between realty and personalty in this respect (i).

Except in the case of a condition *rei non licite*, as a condition in restraint of marriage, or not to dispute the Will, or not to aliene, there is no rule of law that a condition subsequent shall operate merely *in terrorem* unless the legacy is given over to another on breach of the condition. Therefore, where there was a condition subsequent in a Will, revoking a bequest to the testator's daughter in case she became a nun, Lord Cranworth held that the condition was a lawful one, and that her interest ceased upon a breach of it, though there was no gift over (k).

(5) Conditions in Restraint of Marriage.

Conditions not importing absolute celibacy valid.

With regard to conditions in restraint of marriage, it is settled that conditions which do not directly or indirectly import an absolute injunction to celibacy are valid (l). Thus

(e) *Metcalf v. Metcalfe*, [1891] 3 Ch. 1, 4.

(f) *Re Chapman*, [1904] 1 Ch. 431; [1905] A. C. 106.

(g) *Theobald on Wills* (7th ed.), p. 631; *Churchill v. Marks*, (1844) 1 Coll. 441; *Re Porter*, [1892] 3 Ch. 481.

(h) *Shaw v. Ford*, (1877) 7 C. D.

669; and see *Re Percy*, (1883) 24 C. D. 616. *Re Parry and Daggs*, (1885) 31 C. D. 30.

(i) *Shaw v. Ford*, *ubi sup.*

(k) *Re Dickson's Trust*, (1850) 1 Sim. N. S. 37.

(l) *Scott v. Taylor*, (1788) 2 Dick. 712, 721.

conditions restraining marriage under twenty-one, or other reasonable age, without consent (*m*), or requiring or prohibiting marriage with particular persons (*n*), are valid. Even a restraint upon a woman's freedom of marriage to be continued during the whole of her life unless her marriage were with the consent of a married person is valid (*o*). So also a condition or gift over on the marriage of a widow (*p*) or a widower (*q*) is valid in respect of personal estate, which is regulated by the civil law, and also to devises of land, which are regulated by the common law (*r*).

A gift to a legatee for life if she shall so long remain unmarried is valid (*s*). Limitations until marriage may be good where limitations defeasible on marriage would be bad (*t*). Limitation until marriage.

Further, even with respect to conditions in restraint of marriage generally, if there be a direction that the legacy, in the event of a breach, shall go over to another legatee, the condition is obligatory, for the Court is bound to protect the interest of the party in whose favour the ulterior limitation is made (*u*). Limitation over on marriage.

(6) *Legacy to a Person in the Character of Executor.*

A legacy to a person in the character of executor is considered to be given upon the implied condition that he clothe himself with that character. Presumption as to legacy to executor.

The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the Will, to repel that presumption (*x*). Presumption may be rebutted.

(*m*) *Beaumont v. Squire*, (1852) 17 Q. B. 905. As to what is sufficient consent see cases cited in Williams (10th ed.) 1023 *et seq.*

(*n*) *Hodgson v. Halford*, (1879) 11 C. D. 959; *Jenner v. Turner*, (1880) 16 C. D. 188, and other instances given in Williams (10th ed.) 1021.

(*o*) *Re Whiting's Settlement*, [1905] 1 Ch. 96.

(*p*) *Newton v. Marsden*, (1862) 2 J. & H. 356.

(*q*) *Allen v. Jackson*, (1875) 1 C. D. 399.

(*r*) *Jones v. Jones*, (1876) 1 Q. B. D. 279.

(*s*) *Heath v. Lewis*, (1853) 3 De G. M. & G. 964.

(*t*) See *Evans v. Rosser*, (1864) 2 H. & M. 190, 195.

(*u*) Williams (10th ed.) 1023.

(*x*) *Ibid.*, 1027; *Re Appleton*, (1885) 29 C. D. 893, 895.

Parol evidence admissible.

Parol evidence is admissible to rebut this as well as any other presumption (y). If the presumption is rebutted the legatee will be entitled to receive the legacy whether he accepts the office or not.

What sufficient indication of intention to rebut presumption.

The fact of a legacy being payable to a legatee (who is named as one of the executors) after the death of a tenant for life rebuts the presumption that the legacy was given to him in his character of executor (z).

So where the gift is expressed to be in respect of the testator's relationship, or as a mark of respect or friendship, the presumption is rebutted by the context (a).

The mere fact, however, that the gift of the legacy precedes the appointment of the legatee as executor, or that the legacies to several persons appointed executors differ either in their amount or subject-matter, is not enough by itself to rebut the presumption (b).

Executor need not prove Will provided he manifests intention to act.

It is not absolutely necessary to prove the Will in order to entitle a person to a legacy as executor. It will be a sufficient assumption of his character of executor if the legatee unequivocally manifests an intention to act in the executorship, although prevented by death from proving the Will (c).

Request that executor should have handsome gratuity void: *secus*, reasonable remuneration.

A request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty (d). But a gift of reasonable remuneration to an executor for his trouble is effectual, and the Court will ascertain the amount (e).

(y) *Re Appleton*, *ubi sup.*

(z) *Re Reeve's Trusts*, (1877) 4 C. D. 841.

(a) See Williams (10th ed.) 1039 *et seq.*

(b) *Re Appleton*, *ubi sup.*

(c) Williams (10th ed.) 1030; *Lewis v. Matthews*, (1869) L. R. 8 Eq. 277.

(d) *Jubber v. Jubber*, (1839) 9 Sim. 503.

(e) *Jackson v. Hamilton*, (1846) 3 J. & L. 702.

CANADIAN NOTES.

There may be a present vested interest with a valid direction postponing the time of payment. *Butler v. Butler* (1896), 29 N.S.R. 145.

A legacy to A. and B. by a will provides that they should "work on the farm until their legacies became due," is a gift on condition, and the legacy is forfeited if they do not work. *Oliver v. Davidson* (1882), 11 S.C.R. 166.

As to the construction of devises containing conditions relating to the conduct of the legatee. See *Jordan v. Dunn* (1888), 15 A.R. 744; *Re Quay* (1907), 14 O.L.R. 471; *Re Fox* (1884), 8 O.R. 489.

A bequest upon condition precedent does not take effect if the condition becomes impossible before the vesting. *McCallum v. Riddell* (1893), 23 O.R. 537.

As to devises involving a vesting of realty at a future date. See *Williams v. Thurston* (1889), 21 N.S.R. 357; *Merchants Bank v. Keefer* (1885), 13 S.C.R. 515; *Bigelow v. Bigelow* (1872), 19 Gr. at p. 554; *Kinsey v. Douglas* (1892), 22 O.R. 553.

When a legacy is charged on land, and the gift and direction to pay at a future time are distinct, the legacy is vested. *Re Stevens* (1887), 14 O.R. 707.

A devise subject to a condition that the devisee pay the debts of another person than the testator renders the land subject to such debts unconditionally. *Botsford v. Botsford* (1886), 11 N.B.R. 458.

If a condition subsequent, as to maintain A., becomes impossible by reason of A.'s death, the gift is absolute. *Graham v. Bolton* (1885), 9 O.R. 481.

A condition not to sell or mortgage during the devisee's lifetime is only in partial restraint and valid. *Re Porter* (1907), 13 O.L.R. 399. But a total restriction is not valid

merely because limited as to time. *Blackburn v. McCallum* (1903), 33 S.C.R. 65.

The testator bequeathed to his two infant sons \$4,000 each, contingent upon their attaining twenty-five years of age, and also to each one-tenth of the residuary estate. The infants were held entitled to the interest on the contingent legacies as maintenance. *In re McIntyre, McIntyre v. London and Western Trust Co.* (1904), 7 O.L.R. 548.

An absolute gift to a wife of all real and personal property, "with full power to dispose of part or the whole as she and the children may think wisest," is an absolute gift, and the children take nothing. *Re McDougall* (1904), 8 O.L.R. 640. See also *McIsaac v. Beaton*, 38 N.S.R. 60, 37 S.C.R. 120; *McLaren v. Coombs* (1869), 16 Gr. 602. But a gift to a wife of "the whole control of my real and personal estate as long as she lives," with a gift over of the land, farm stock and implements, is a gift for life only. *Re Turnbull* (1906), 11 O.L.R. 334.

Impossible
condition.

A testator released his daughter from a debt to him "on condition of her in no way making any claim for any cause whatsoever against my estate or causing any dispute in regard to the same or the management thereof by my executor," and appointed an executor. By a codicil he revoked the appointment of the executor and appointed his daughter sole executrix. It was held that the condition had become impossible and the gift absolute. *Townshend v. Brown* (1890), 22 N.S.R. 423.

Absolute
interest in
defined
fund.

A gift of personalty to a wife "for her own use during her life" with a gift over of "any money or securities which may remain at her death," gives her absolute power to dispose of the principal. *Re McDonald* (1903), 35 N.S.R. 500. And the gift is absolute, where it is a gift for life, with power of disposal and no gift over. *Re Bethune* (1904), 7 O.L.R. 417.

Where a testator gives a legatee an absolute vested interest in a defined fund the Court will order payment on his at-

taining twenty-one, notwithstanding that by the term of the will payment is postponed to a subsequent period. *Goff v. Strohm* (1897), 28 O.R. 553. And where vested legacies were directed to be paid at certain ages, "or as soon thereafter as they (the executors) shall deem it advisable to do so," it was held that the executors had no authority to refuse payment after the time fixed. *Lewis v. Moore* (1897), 24 A.R. 393.

Where the concluding words of a devise of certain realty to the testator's wife were that she may "sell (it) and use the money as she thinks best," these words were held not inconsistent with a limitation upon her interest in the property itself. *Re Silverthorne* (1907), 15 O.L.R. 112.

The testator devised to his wife "her heirs, executors and administrators, to and for her own use and benefit," all and singular his real and personal estate. The will contained a proviso that "in the event of my said wife not having disposed of any of said property, real or personal, in her lifetime, or by her last will and testament, the portion of the estate so remaining undisposed of should vest in trustees. Held, that testator's wife took an absolute interest in the property devised to her, and that the proviso vesting in trustees the property undisposed of was void as repugnant in law. *Bowman v. Oram*, (1894), 26 N.S.R. 318. Followed in *Corning v. Bent* (1903), 23 C.L.T. Occ. N. 336. And see *Re McDonald* (1903), 6 O.L.R. 478; *Re Smith* (1904), 4 O.W.R. 226; *Butler v. Butler* (1896), 29 N.S.R. 145; *Re Livingston* (1907), 14 O.L.R. 161; *Re Stainsbury* (1907), 14 O.L.R. 468; *Leonard v. Leonard* (1899), 1 N.B. Eq. 576; *Re Thomas v. Shannon* (1898), 30 O.R. 49.

Repugnant
proviso.

A gift of a sum of money for life is an absolute gift. *Re Chapman* (1902), 4 O.L.R. 130. But such a gift may be restricted to the life of the donee, if it appears from the will that the life tenant is to receive the income only, although the terms of the gift are absolute. *Foot v. Foot* (1888), 15 S.C.R. 699.

A condition in general restraint of marriage of an unmarried person is void. *In re Hamilton* (1901), 1 O.L.R. 10.

Void
condition,
restraining
marriage.

A gift to a widow of money *durante viduitate*, with a gift over if she marries again is a gift for her life only. *Re Daly* (1906), 37 N.B.R. 483.

Valid
condition,
restraining
remarriage.

A testator provided by his will that "my wife shall have the whole of my estate which remains at my decease, however, with the observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty. Held, that the condition against remarriage was valid, that there was a gift to the widow of the whole residue subject to gift over on her remarriage. The executor was directed to hold two-thirds of the estate, paying the widow the income until her death or remarriage. If she died without remarrying the two-thirds would pass under her will, otherwise under the testator's. *In re Deller* (1903), 6 O.L.R. 711. And see *Doe dem Livingstone v. Corrie*, 5 N.B.R. 450.

A legacy given beneficially is not affected by the appointment of the legatee as executor in a subsequent part of the will. *Lyons v. Blott* (1869), 16 Gr. 368.

Executors
taking
beneficially.

Where executors were to take "share and share alike" and the only charge imposed on them was the maintenance of the testator's wife who predeceased him, it was held that they took beneficially. *Ballard v. Stover* (1887), 14 O.R. 153. See *Higginson v. Kerr* (1898), 30 O.R. 62.

Where property is bequeathed to executors upon trusts which fail for uncertainty, they do not take the property beneficially. *Davidson v. Boomer* (1868), 15 Gr. 1; *Re Wilson* (1899), 30 O.R. 553. Nor where they take upon trusts which do not exhaust the estate, though the gift upon trust is coupled with a power to dispose of the whole estate as they shall deem fit. *Re Brown* (1891), 8 Man. R. 391.

Void
condition,
restraining
parental
rights.

A condition in restraint of parental rights is void. *Clarke v. Darragh* (1883), 5 O.R. 140.

Where a legatee enjoys the benefit given to him by the will upon the conditions expressed in it, he is under a per-

sonal liability enforceable in Court to fulfil those conditions. *Gillespie v. Gillespie* (1908), 8 W.L.R. 725.

Two sisters were held entitled to a fund, they having been given under the will the income thereof in perpetuity and there being no gift over of either corpus or income. Lands were devised in fee simple to a son, but not to be sold for five years unless with two sisters' consent. The son predeceased the sisters. As the conditions were personal the devise must be construed strictly, and on the son's death the lands passed freed from all conditions. *Re Attrill* (1908), 12 O.W.R. 204.

Legacy
recoverable
at common
law.

See generally re vested, contingent and conditional devises and bequests. *Fuller v. Anderson* (1891), 20 O.R. 424; *Becker v. Miller* (1878) 25 Gr. 528. *McCallum v. Riddell* (1893), 23 O.R. 537; *McKinnon v. Lundey* (1894), 21 A.R. 560; *Armstrong v. Mason* (1894), 25 S.C.R. 263; *Crawford v. Brady* (1894), 25 O.R. 635; *Merchants' Bank of Canada v. Keefer* (1884), 13 S.C.R. 515; *Kerr v. Smith* (1896), 27 O.R. 409; *Mealey v. Aikins* (1880), 27 Gr. 563; *Re Winstanley* (1884), 6 O.R. 315; *Re Northcote* (1889), 18 O.R. 107; *Graham v. Bolton* (1885), 9 O.R. 481; *Jordan v. Dunn* (1887), 13 O.R. 267, 15 O.A.R. 744; *In re Macklem and the Commissioners of the Niagara Falls Park* (1887), 14 A.R. 20; *Macklem v. Macklem* (1890), 19 O.R. 482; *Re Casner* (1883), 6 O.R. 282; *Re Livingston*, 14 O.L.R. 161; *Paulin v. Windsor* (1904), 36 N.S.R. 441; *Re Sandison* (1907), 6 W.L.R. 615; *Morrow v. Jenkins* (1885), 6 O.R. 693; *Chubbock v. Murray* (1897), 30 N.S.R. 23; *Rogers v. Lowthian* (1880), 27 Gr. 559; *Re Hanmer* (1905), 9 O.L.R. 348; *McCrary v. McCrary* (1863), 22 U.C.R. 520; *Re Mumby* (1904), 8 O.L.R. 283; *Re Tuck* (1905), 10 O.L.R. 309; *Re Archer* (1907), 14 O.L.R. 374.

Though on an absolute gift to A., with a remainder over to B., the gift to A. is absolute, yet, if it appears, in the gift to A. that he was intended to take for life only, the remainder over is good, and A. takes a life interest only. *Osterhout v. Osterhout* (1904), 7 O.L.R. 402, 8 O.L.R. 685.

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As to bequests of chattels for life, see *Dickson v. Street* (1844), 1 U.C.R. 180; *Thorpe v. Skillington* (1868), 15 Gr. 85.

A devise of a hotel for life was held to pass an absolute title to the good-will. *Taylor v. McFarlane* (1902), 4 O.L.R. 239.

CHAPTER XXXVI.

OF THE EXECUTOR'S ASSENT AND OF THE PAYMENT OF LEGACIES AND DISTRIBUTION.

SECT. 1.—*Protection after issuing Advertisements.*

AFTER issuing advertisements, and taking the steps pointed out by the Act 22 & 23 Vict. c. 35, s. 29 (a), an executor or administrator will have the same protection against debts or claims, of which he has no notice, as if he had administered the estate under a decree of the Court (b); and after satisfying all claims of which he has notice the executor, or administrator with the Will annexed, may safely assent to the specific legacies, and pay the pecuniary legacies, and distribute the residue; and in the case of an intestacy the administrator may, in like manner, distribute the estate among the next-of-kin.

Effect of 22
& 23 Vict.
c. 35, s. 29.

Sect. 29 of 22 & 23 Vict. c. 35 is not confined to claims of creditors, but applies also to persons having claims as next-of-kin. It also affords protection to the sureties in an administration bond, where the administrator before distributing the assets of the intestate has pursued the course pointed out by that section (c).

SECT. 2.—*Of the Executor's Assent.*

Inasmuch as the executor is responsible to the creditors for the satisfaction of their claims to the extent of the whole of the assets, as a protection to the executor the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect (d).

Assent necessary to complete legatee's title.

(a) See *ante*, p. 340.

(b) Clegg v. Rowland, (1866) L. R. 3 Eq. 368.

(c) Newton v. Sherry, (1876) 1 C. P. D. 246.

(d) Williams (10th ed.) 1101.

Legatee
before assent
has transmissi-
ble right.

Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered (e).

Before assent
executor may
maintain
trover or tres-
pass against
legatee.

It follows from the rule as to the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executors may maintain an action of trespass or trover against him. So, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor: by whom, in such case, an action will lie to recover it (f).

Whether the executors are right in withholding their assent is a question for the consideration of a Court of Equity (g).

After assent
legatee may
maintain
action
at law.

After assent to the bequest of a specific chattel it vests absolutely in the legatee, and he can maintain an action at law for it, even against the executor himself (h). But no action at law will lie for a general legacy (i), or for a share of residue (k).

So the title to leaseholds upon the assent of the executor vests absolutely in the legatee, without any deed of assignment (l).

The assent has relation to the time of the testator's death (m).

Effect of
Land Trans-
fer Act, 1897,
as to real
estate.

With regard to real estate, which now vests in the personal representative, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), provides as follows:—

Sect. 2 (1). "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives

(e) Williams (10th ed.) 1101.

(f) *Ibid.*, 1103

(g) Elliott v. Elliott, (1841) 9 M. & W. 23, 26.

(h) *Ibid.*; Doe v. Guy, (1802) 3 East, 120, 123.

(i) Deeks v. Strutt, (1794) 5 T. R.

690.

(k) Jones v. Tanner, (1827) 7 B. & C. 542; and see Williams (10th ed.) 1568.

(l) *Re Culverhouse*, [1896] 2 Ch. 251.

(m) Williams (10th ed.) 1108.

of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

(2) (*inter alia*) "The powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

Sect. 3 (1). "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

The charge subject to which the assent or conveyance is made does not extend to debts for which prior to the Act the personal representative would not have been liable as regards the personal estate, for instance, for debts of which he has no notice after having issued the proper advertisements under s. 29 of the Act 22 & 28 Vict. c. 35. Therefore the devisee after assent or conveyance can make a good title to a purchase without regard as to whether there may be other debts of which the legal personal representative had not had notice (n).

Sect. 3 (2). "At any time after the expiration of one year

(n) *Re Cary & Lott's Contract*, [1901] 2 Ch. 463.

from the death of the owner of the land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land either solely or jointly with the personal representatives."

Assent may be either express or implied.

Assent on the part of the executor may be either express or implied (o); whether there has been an assent or not may involve matter of law, but it is generally a question of fact (p).

What amounts to assent.

Assent to particular chattel not assent to other chattels.

Where an executor assents to a taking by one of several legatees of one specific thing it is necessarily an unqualified assent, being a parting with his interest in the chattel altogether; but where there are several chattels bequeathed, the assent given to a particular chattel is not necessarily an assent to all, since the executor may withhold his assent as to part (q).

Assent to particular interest is an assent to interests in remainder.

An assent to the estate of a legatee for life is an assent to the bequest in remainder (r).

Assent to part of residue is assent to the whole.

So an assent to take part as residuary legatee is an assent to take the whole, because it admits that there is a residue, and that the debts and legacies, which alone could entitle the executor to withhold his assent, are paid (s).

Payments on account do not amount to assent to whole legacy.

The mere fact that an executor has made general payments to or for the benefit of a legatee of leaseholds and other property—not specifically out of or on account of his rents—was held, in the absence of representations on the subject by the executor to the legatee, not sufficient to enable the Court to infer that the legacy had been assented to (t). The act or expression to be sufficient should be unambiguous, since where

(o) Williams (10th ed.) 1104, and see there the numerous instances given as to what may constitute assent.

(p) Elliott v. Elliott, (1841) 9 M. & W. 23, 27.

(q) *Ibid.*

(r) *Ibid.*; Stevenson v. Mayor of Liverpool, (1874) L. R. 10 Q. B. 81.

(s) Elliott v. Elliott, *ubi sup.*

(t) Thorne v. Thorne, [1893] 3 Ch. 196.

an act or expression is ambiguous, and applies equally to either view of a question, it is no evidence at all for the jury (u).

A conditional assent is sufficient only where it is the case of a condition subsequent, or such a one as the executor had no authority to annex for his own benefit, since failure in performing will not divest the legatee of his legacy (x).

Conditional assent.

A person appointed executor may assent to a legacy before he proves the Will, and his assent will be effectual though he should die before probate (y). Further, the assent of any one of several executors is sufficient, even to his own legacy, without the others; and if the subject be entire and given to all the executors, the assent of any one of them to his own proportion will be sufficient (z).

Assent before probate.

Assent of one of several executors.

Upon general principles, when an executor, who is also a specific legatee, takes possession, *prima facie*, he does so by virtue of his character of executor and not in that of legatee. But the executor, having taken possession, may afterwards expressly, or by implication, elect to treat his possession as that of legatee and not of executor, and that whether he be entitled to the subject-matter of the legacy absolutely, or for a qualified interest only with a limitation over to others. In the latter case the assent of the executor, in general, enures, not only for his own benefit, but for the benefit also of those who take after him (a).

Possession of executor legatee *prima facie* referable to his representative character.

Accordingly, where an executor takes an interest in a leasehold estate for his life, he must do something more than enter in order to give assent to the legacy, as the entry is referable to his character of executor, and is not evidence of an assent to the legacy (b).

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual; and if he takes the thing bequeathed without the permission of the administrator *cum*

Executor legatee renouncing probate, his assent ineffectual.

(u) Doe v. Harris, (1847) 16 M. & W. 517, 520.

(x) Williams (10th ed.) 1106; Elliott v. Elliott, *ubi sup.*, at p. 28.

(y) Williams (10th ed.) 110.

(z) Williams (10th ed.) 1114; Town-

son v. Tickell, (1819) 3 B. & Ald. 31, 40.

(a) Trail v. Bull, (1853) 22 L. J. Ch. 1082, per Ld. Cranworth.

(b) Doe d. Hayes v. Stranges, (1816) 7 Taunt. 217; Trail v. B. II, *ubi sup.*

Executor
trustee assent-
ing consti-
tutes himself
trustee.

testamento annexo, he will incur the same liabilities as any other legatee so acting (c).

Upon assenting to a specific bequest given to them in trust, executors forthwith become trustees. Whether such assent has been given is often of importance, having regard to the distinction between the liability of several executors and that of trustees (d). Moreover, executors who have set apart and appropriated assets to meet a trust legacy can no longer retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator (e).

Although, as a general rule, where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor (f), yet if where a person is both executor and trustee, and a long time has elapsed during which there is no evidence of the executor having anything to do in the character of executor, and it is admitted there are no debts, and no other reason for selling is suggested, it will be inferred that his title is that of trustee, and that he has ceased to have the powers of executor (g).

SECT. 8.—Of the Time of Payment of Legacies.

Payment
cannot be
enforced
before 12
months.
Rule for con-
venience of
executor
only.

An executor cannot be compelled to pay a legacy before the expiration of twelve months from the testator's death, notwithstanding a direction in the Will that payment should be made sooner. There is, however, no rule which prevents an executor, if he thinks proper, paying legacies or handing over the residue within the period of twelve months, as it is only for the convenience of the executor in order to ascertain the debts and assets of the testator (h).

Court may
allow pay-
ments of
income or
capital on
account.

Where any real or personal estate forms the subject of any proceedings in the Chancery Division, Ord. 50, r. 9, of the

(c) Williams (10th ed.) 1114; and see 20 & 21 Vict. c. 77, s. 79, *ante*, p. 55.

(d) *Dix v. Burford*, (1854) 19 Beav. 409; and see *ante*, p. 4.

(e) *Ballard v. Marsden*, (1880) 14

C. D. 374.

(f) *Re Venn & Furze's Contract*, [1894] 2 Ch. 101.

(g) *Re Verrell's Contract*, [1903] 1 Ch. 65.

(h) Williams (10th ed.) 1114.

R. S. C. provides that if the judge is satisfied that the same will be more than sufficient to answer all claims thereon, he may at any time after the commencement of the proceedings allow the parties interested the whole or part of the income thereof, or part of the capital of personal estate.

In the case of an immediate legacy vested but subject to be divested upon a future contingency, in the nature of a condition subsequent, Lord Thurlow in *Griffiths v. Smith* (i) directed payment to the legatee without security, and this was followed by Sir W. Grant in *Fawkes v. Gray* (k). But it would seem that these cases are contrary to the whole stream of equity since. If it is liable to be divested by any event, the course of the Court then is not to pay, but keep the fund *in medio* until the contingency is determined (l).

If legacy liable to be divested fund is kept *in medio*.

In *Colston v. Morris* (m), where a legacy was given to a father on condition that he did not interfere with the education of his daughter, the Court required security from the father before paying him the legacy.

A bequest of an annuity, unless otherwise directed, commences from the death of the testator, and the first payment is paid at the end of the year from the testator's death (n).

Payment of annuities.

Where an annuity is given by Will with a direction that it shall be paid monthly, the annuity commences from the testator's death, but the first payment is made at the end of a month after the testator's death (o).

But where an annuity is by Will directed to be payable quarterly, the first payment to be made within eighteen months after the testator's death, the annuity does not commence till fifteen months from the death of the testator (p).

Where an annuity is directed by the testator to be purchased, the right to take its value in cash, instead of the annual sum, vests in the annuitant on the testator's death, and

(i) (1790) 1 Ves. 97.

(k) (1811) 18 Ves. 130.

(l) *Colhoun v. Thompson*, (1828) 2 Molloy, 281, 287, 290, per Lord Chancellor Hart.

(m) (1821) 6 Madd. 89.

(n) *Gibson v. Bott*, (1802) 7 Ves. 89, 96.

(o) *Houghton v. Franklin*, (1823) 1 S. & S. 390.

(p) *Irvin v. Ironmonger*, (1831) 2 R. & My. 531.

General legacy for life with remainder over, first payment of interest at end of two years.

should the annuitant die before it is purchased, his legal personal representatives are entitled to the sum which at the date of the testator's death would have purchased the annuity (*q*).

If a general legacy is given for life with remainder over, no interest is due till the end of two years, since the legacy is not payable till the end of one year after the testator's death, and until the legacy is payable there is no fund to produce interest (*r*).

As a general rule a gift of an annuity to A. is a gift of the annuity during the life of A. and nothing more (*rr*). On the other hand *prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity, and is consequently a gift of the fund itself (*s*); and it makes no difference that the fund is given to trustees to apply the income (*ss*).

SECT. 4.—Appropriation of Funds to provide for Future and Contingent Legacies.

Vested legacy payable in futuro.

If there is a vested legacy which will certainly be payable in futuro, the legatee is entitled to insist upon the executor investing the amount of it, and when it is done that will be an appropriation in the strict sense of the term, and the gain or loss upon the investment (as the case may be) will go to or fall upon the legatee (*t*).

Contingent legacy.

Where the legacy is contingent, and the legatee is, on the happening of the contingency, to take the legacy without interest in the meantime, the legatee is not entitled to require a sum to be appropriated to answer the legacy. It remains part of the testator's estate. It need not prevent the executor or the Court distributing the residue, after taking reasonable care to provide for the contingent legacy; but the fund so set apart would be set apart, not as a legacy, but to answer or secure the legacy, and the fund will still remain part of the

(*q*) *Re Robbins*, [1906] 2 Ch. 648; [1907] 2 Ch. 8.

(*r*) *Gibson v. Bott*, *ubi sup.*

(*rr*) *Blight v. Hartnoll*, (1881) 19 C. D. 294; *Re Morgan*, [1898] 3 Ch. 222, 228.

(*s*) *Adamson v. Armitage*, (1815) 19 Ves. 416.

(*ss*) *Page v. Leapingwell*, (1812) 18 Ves. 463; *Haig v. Swiney*, (1823) 1 Sim. & Stu. 487.

(*t*) *Re Hall*, [1903] 2 Ch. 226.

estate, the income ought to be paid as part of the residue, and on the happening of the contingency the legatee will be entitled to receive the amount of the legacy in full in cash (*tt*).

Of late years the leaning of the Court is not to order a fund to be paid into Court to provide for a legacy, but rather to get rid of a fund where there are proper trustees to take care of it. But if proper trustees are not kept up, or if for any other cause the fund is in jeopardy, an application can be made for its protection by the Court (*u*).

Payment into Court not ordered unless fund in jeopardy.

As against the residuary legatee an annuitant is not entitled to have the personal estate converted and an amount sufficient to secure the annuity invested; he is only entitled to have the annuity sufficiently secured (*x*). And where an annuity is payable out of the income of the clear residuary estate, the Court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatees (*y*).

Annuitant entitled only to have annuity sufficiently secured.

SECT. 5.—*Of Interest on Legacies.*

A legacy bequeathed generally, without assigning any time for payment, bears interest only from a year after the death of the testator, though the fund out of which it is to be paid consists of stock and other matters yielding immediate profit. And if the executor has assets, the pecuniary legacies bear interest from the expiration of the year, although the assets have not been productive (*z*).

General legacy bears interest from a year after testator's death.

And where legatees have had to wait for the payment of their legacies until after the falling in of a reversionary interest, they are entitled not merely to six years' arrears of interest, but to interest on their legacies from the expiration of one year after the testator's death (*a*).

Interest does not become payable on a legacy before it is due, and since a legacy to a person in his capacity of executor

Deferred legacy.

(*tt*) *Ibid.*

(*u*) *Re Braithwaite*, (1882) 21 C. D. 121.

(*x*) *Re Parry*, (1889) 42 C. D. 570.

(*y*) *Harbin v. Masterman*, [1896] 1

Ch. 351.

(*z*) *Pearson v. Pearson*, (1802) 1 Sch. & Lef. 10.

(*a*) *Re Blachford*, (1884) 27 C. D. 676.

is not due unless he accepts the office and duties of executor, and an infant cannot accept the office of executor, it follows that a legacy to an infant as executor does not carry interest until he is of age (b).

Where the direction to pay is at a fixed time the legacy bears interest as from that time, but where the direction is to pay within a fixed period the question arises whether the delay authorised was for the personal benefit of the residuary legatee, as in *Thomas v. Att.-Gen.* (c), in which case interest does not begin to run until the end of the period, or the postponement is simply for the convenience of the testator's estate for the purpose of giving the executors time to collect and get in the assets, in which case, assuming the executors have assets in hand actually realized, the unpaid legacies carry interest from the expiration of one year after the testator's death (d).

Vested legacy
subject to be
divested.

A vested legacy subject to be divested on the happening of a particular event, as the death of the legatee under the age of twenty-one years, carries interest from a year after the testator's death, and should the legatee die under the age of twenty-one years, any arrears of interest up to that time will be payable to his legal personal representative (e).

Contingent
legacy.

A contingent legacy does not carry interest until it vests, but where there is a severance of the legacy from the rest of the estate, if the legacy is severed merely for purposes of administration, as because the residue is to be paid over at once, or to be invested in land, the contingent legatee is not entitled to the income of the fund in the meantime until the legacy vests, as the funds remain residue until the contingency happens. But if a severance from the residue is directed for any purpose connected with the legacy itself, that fact, without anything else, is sufficient to make the legacy carry interest, and if the legacy vests by the happening of the event, the legatee will be entitled to the income accrued in

(b) *Re Gardner*, (1892) 67 L. T. L. J. Ch. 525.
(N. S.) 552.

(c) (1837) 2 Y. & C. 525.

(e) *Re Buckley's Trusts*, (1883) 22
C. D. 583.

(d) *Olive v. Westerman*, (1884) 53

the meantime. The difficulty is in the application of the rule to particular instances (*f*).

Where a legacy is decreed to be a satisfaction of a debt, the Court gives interest from the testator's death, for the satisfaction must take place immediately at the testator's death (*g*). Legacy in satisfaction of debt.

But a legacy to the testator's wife in lieu of dower or freebench carries interest only from the expiration of a year from the testator's death, since this is a case of election (*h*).

Where a legacy is given to an infant by a parent, or one *in loco parentis*, interest from the testator's death is allowed as a provision for maintenance (*i*). This exception does not extend to a provision for an adult child (*k*), or a wife (*l*). Legacy to infant by testator *in loco parentis*.

Interest may also be allowed as from the death of the testator from an implied direction, where otherwise there would not be any fund for maintenance, as where a fund is given "for the use and support of the younger children" of nephews; but this rule has not been extended to the case of adults; nor does it extend to the income of a trust legacy to a daughter-in-law subject to the obligation of maintaining her deceased husband's children while minors and unmarried (*m*).

In the case of legacies charged upon lands only, where no day of payment is fixed, interest is chargeable from the death of the testator (*n*). Legacy charged only on land.

The general rule of the Court is that arrears of an annuity do not carry interest, and there is no exception to this rule where the annuity was a provision for a wife or child. The cases in which the Court, in the absence of express contract, allows interest are confined to those where the annuitant has held some legal security which but for the interference of the Court he might have made available for the obtaining of Arrears of annuity.

(*f*) *Re Inman*, [1893] 3 Ch. 518;
Re Snaith, (1894) 71 L. T. 318, per
North, J.

(*g*) *Clark v. Sewell*, (1744) 3 Atk.
99.

(*h*) *Re Bignold*, (1890) 45 C. D.
496.

(*i*) *Re Bowlby*, [1904] 2 Ch. 685.

(*k*) *Wall v. Wall*, (1847) 15 Sim.
513.

(*l*) *Re Whittaker*, (1882) 21 C. D.
657.

(*m*) *Re Crane*, [1908] 1 Ch. 379.

(*n*) *Pearson v. Pearson*, *ubi sup.*;
Re Waters, (1889) 42 C. D. 517.

interest, or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay (*o*).

It makes no difference whether the annuity is charged on corpus or merely on income (*p*).

Rate of
interest.

Where a legacy has not been paid at the proper time, then, as between the legatee and the person entitled to the residue, it has been the rule of the Court ever since *Sitwell v. Bernard* (*q*) to allow the legatee interest at the rate of 4 per cent. only (in the absence of special circumstances), even although the residue may have produced interest at a higher rate (*r*).

By Ord. 55, r. 64, where a judgment or order is made directing an account of legacies, interest shall be computed thereon at 4 per cent. from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate is directed by the Will, and in that case according to the Will.

SECT. 6.—*Of Currency in which Legacies are to be Paid and Cost of Remittance.*

General rule
legacy pay-
able in
currency of
country
where testator
died domi-
ciled.

The general rule, apart from the context, is that if a testator domiciled abroad gives a sum of money by Will it shall be paid to the legatee in current money of the country where the testator was domiciled. It is immaterial that the legatee resides elsewhere, or that the assets of the testator are partly in the place of his domicile and partly elsewhere (*s*).

English
Courts can
only order
payment in
English
currency.

Mode of
ascertaining
amount in
English
currency.

Speaking generally, the Courts of this country have no jurisdiction to order payment of money except in the currency of this country. The sum ordered to be paid must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution. Therefore, in such cases it becomes necessary to consider how much money in English currency the defendant ought to pay the plaintiff. The

(*o*) *Torre v. Browne*, (1855) 5 H. L. C. 555, 577, per *Ld. Cranworth*.

(*p*) *Wheatley v. Davies*, (1876) 35 L. T. 306.

(*q*) (1801) 6 Ves. 520.

(*r*) *Re Campbell*, [1893] 3 Ch. 468, 472, per *Stirling, J.*

(*s*) *Saunders v. Drake*, (1742) 2 Atk. 465.

amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchaseable commodity, i.e., in practice, according to the rate of exchange existing at the particular time between the currencies(*t*).

If the legatee requires payment to be made to him at a place elsewhere than where the assets are being administered, he must pay the cost of remittance(*u*), that is the cost of purchasing for and sending to the legatee a draft on the place of remittance in favour of the legatee for the equivalent. Cost of remittance.

And in all cases where land alone is subjected by Will with the payment of a sum of money, in the absence of any contrary intention to be inferred from the context or circumstances, there is no obligation to pay the money at any place except upon the land, and therefore the cost of remittance to any other place must be paid by the legatee(*x*).

CANADIAN NOTES.

In Nova Scotia the legislature (32 Geo. II. c. 11), had enacted that "a legacy may be sued for and recovered at common law any law custom or usage to the contrary notwithstanding." The Supreme Court of Nova Scotia accordingly held that an action for a certain legacy can be maintained in common law Courts against any person who, under the will, is made liable to pay such legacy, and receives, under such will, funds sufficient to pay it. *Ells v. Ells* (1871), 1 N.S.R. 173. Likewise in New Brunswick against an executor as an action of debt. *Livingston v. Powell* (1837), 2 N.B.R. 361.

Legatees are not necessary parties defendant in an administration suit. *Harrison v. Shaw* (1866), 2 Ch. Ch. 44.

(*t*) *Manners v. Pearson & Son*, (1830) 1 R. & M. 453.
 [1898] 1 Ch. 581. (*x*) *Lansdowne v. Lansdowne*,
 (*u*) *Cockerell v. Barber*, (1810) (1820) 2 Bligh. 60.
 16 Ves. 461; *Campbell v. Graham*,

See, as to action by administrator *de bonis non*, to enforce a covenant for payment of a legacy. *Mowbray v. Fletcher* (1908), 11 O.W.R. 937.

Costs.

In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the Master's office. *Gorham v. Gorham* (1870), 17 Gr. 386.

Bare trustee.

Although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it. *Archer v. Severn* (1887), 12 O.R. 615.

Assent implied.

The assent of an executor to a legacy may be by implication as well as by express words, *e.g.*, from his conduct. *Honsberger v. Honsberger* (1877), 5 O.S. 479; *Teahon v. Leamy* (1861), 21 U.C.Q.B. 216.

Admission of assets.

Payment of a legacy in full is a *prima facie* admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion, but it is open to explanation. *Coleman v. Whitehead* (1852), 3 Gr. 227.

Payment by the executor of some legacies, and making provision for the others is not a conclusive admission of assets, because the provision which was made for the unpaid legacies may have proved insufficient, without his fault. *Coleman v. Whitehead*, *supra*.

Legacy a charge on farm.

A direction that a legacy shall be paid out of the annual produce of a farm devised to another, or as the executors should deem best, makes it a charge on the farm, notwithstanding the concluding power to executors. *Callaghan v. Howell*, 29 O.R. 329.

Where a testator directed payment of his debts and funeral expenses to be made out of his personalty, and if that proved insufficient his executors were to make up the deficiency out of his land, and then gave pecuniary legacies, it

was held that a mixed fund was created, and if the personality was insufficient for payment of debts then the legacies were payable out of the proceeds of the land; but, if sufficient, then out of the mixed fund. *Toomey v. Tracey* (1883), 4 O.R. 708. And see *Re Gilchrist* (1876), 23 Gr. 524.

Mixed fund.

A testator, after devising certain pecuniary legacies and a home to two of his children until they became of age, provided as follows: "And I will and bequeath unto my daughter, C. S., all my real estate and the remainder of my personal estate after the above legacies are paid." Held, that the legacies were charged upon the real estate. *Johnson v. Denman* (1889), 18 O.R. 66.

Legacy a charge on real estate.

The testator by his will bequeathed to his widow the right to an annual specific sum in lieu of dower. She was held entitled to priority over the other legatees. *Koch v. Heisey* (1894), 26 O.R. 87.

Priority of legacy.

A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended. On an application by the executors at the instance of the Official Guardian, it was held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie* (1893), 22 O.R. 556.

Where a testator devised and bequeathed all his real and personal property to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees and others to charitable associations, and provided that the residue of his estate be divided *pro rata* among the legatees, it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full. *Kennedy v. Protestant Orphans' Home* (1895), 25 O.R. 235.

Succession duty.

J. and his brother carried on business in partnership for over thirty years and the brother having died, his will contained the following request,—“I will and bequeath unto my brother J. all my interest in the business of J. and Co. in

Legatee
not
obliged to
indemnify.

Valid
condition.

Existing
contingent
interest.

Rule as to
payment of
interest.

the said City of St. Catharines together with all sums of money advanced by me to the said business at any time, for his own use, absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible." Held, affirming the decision of the Court of Appeal, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liabilities of the firm in case the assets should be insufficient for the purpose, and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson v. Junkin* (1896), 26 S.C.R. 192.

A condition that, before recovering a legacy, the legatee shall prove to the executors that he was not engaged in the liquor traffic or in any form of gambling or games of chance is valid, but does not apply to playing games for diversion or amusement. And although there is no gift over for the breach of the condition, it is not *in terrorem*. A condition for the vesting of a legacy, payable by instalments, required that the legatee should appear before the executors before receiving any part thereof was held to be satisfied by one appearance. *Re Quay* (1907), 14 O.L.R. 471.

D. was entitled to a legacy under a will provided he survived the testator's wife, and during her lifetime he brought suit to protect this legacy against dissipation of the estate by the widow. Held, reversing the judgment of the Court below, that D. had more than a possibility or expectation of a future interest; he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended. *Duggan v. Duggan* (1890), 17 S.C.R. 343.

The payment of interest on legacies depends upon certain rules, which are modified by the intentions of the testator as expressly or impliedly declared by the language of the will. It is a general rule that interest is not payable on a legacy, whether vested or not, until it is actually due and payable. Interest is given for delay in payment. Interest

is not to be exacted when, by the direction of the testator, there is nothing in hand to pay the legacy. *Re Scadding* (1902), 4 O.L.R. 632.

Where the testatrix directed a legacy to be paid out of the proceeds of lands to be sold at any time within two years of her death, interest runs from the date of sale or the expiration of the two years, whichever first occurs. *Re Robinson, McDonnell v. Robinson* (1892), 22 O.R. 438. In a similar case, held that legacies bore interest from the date when the lands "should have been sold." *McMylor v. Lynch* (1894), 24 O.R. 632.

Overpayments of interest by mistake of fact can be recovered back. *Barber v. Clark* (1890), 20 O.R. 522; 18 O.A.R. 435.

Where an infant is entitled to a legacy payable at majority, from a parent, or a testator who stood in *loco parentis* to him, he is entitled to interest thereon for maintenance during his minority if he has no other means of support, but not otherwise. *Spart v. Perrin*, 17 Gr. 519; *Rees v. Fraser*, 26 Gr. 233.

Infant
entitled to
interest.

Legatees are not entitled to interest until the fund out of which they are to be paid is accumulated. *Smith v. Seaton* (1870), 17 Gr. 397. Where bequests were to be paid twelve months after decease if legatees then of age, interest ran from a year after decease, although legatees not then of age. *Fuller v. Macklem* (1878), 25 Gr. 455. Interest on legacies payable out of the proceeds of the sale of real estate is payable after one year from the death of the testator. *Toomey v. Tracey* (1883), 4 O.R. 708.

Where legacies were made payable seven years after the date of the will, which period the testator outlived, interest was allowed only as in ordinary cases, and the same rule was applied where there was a direction to accumulate interest from a date seven years after the date of the will until the legatee attained twenty-one. *Miller v. Miller* (1877), 25 Gr. 224.

CHAPTER XXXVII.

OF ABATEMENT.

General legacies abate rateably.
Valuation of general legacy of stock.

If the estate is insufficient to pay all the legacies in full, the general legacies must abate in equal proportions.

Where there are general pecuniary legacies and general legacies of stock, such as a general legacy of £10,000 consols, the value of the stock must be estimated according to the price at the end of a year next after the testator's death, when the legatees would have been entitled to have the amount of their legacies purchased and transferred into their names(a).

Valuation of annuities.

All simple gifts of annuities are held to be pecuniary legacies(b).

Where a Will contains a general gift of an annuity, general gifts of legacies, and a gift of the residue, and the entire estate is insufficient to pay the annuity and the pecuniary legacies, the annuity ought to be valued and the annuitant is entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; and although the annuitant should die before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees will have no claim to the surplus of that amount(c).

Annuitant entitled at once to amount of valuation less abatement:

notwithstanding annuity liable to cease during life of annuitant.

Where the annuity payable out of a deficient estate has been valued, the whole amount less the abatement will be directed to be paid to the annuitant, notwithstanding it was payable to him for life or until he should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person(d).

(a) *Anther v. Anther*, (1843) 13 Sim. 422, 440.

(b) *Creed v. Creed*, (1845) 11 Cl. & F. 491, 508.

(c) *Wroughten v. Colquhoun*,

(1847) 1 De G. & Sm. 357.

(d) *Re Sinclair*, [1897] 1 Ch.

921, *Kekewich, J.*, not following *Carr v. Ingleby*, (1831) 1 De G.

& Sm. 362.

In *Re Ross* (e) the value of an annuity, less abatement, bequeathed to a married woman without power to anticipate, was ordered to be laid out in the purchase of an annuity for her, but the married woman having died before this was done, the capital sum was ordered to be paid to her legal personal representative.

Married woman annuitant restrained from anticipation.

In the case of several annuitants, if all the annuitants be living at the period of the division, the values must be ascertained as at the death of the testator; if they be all dead, the values must be taken to be the respective amounts of arrears; but if some be dead and others living, the values as to the former will be taken at the amount of the arrears, and as to the latter, at the amount of the arrears added to the calculated value of the future payments (f).

Time and manner of valuing annuities.

There is no difference in principle where the annuity has been given in expectancy on the death of another person (g).

In *Re Metcalf* (h), in settling the proportions of abatement, the question was raised whether sums received by immediate annuitants during the first five years ought to be brought into hotchpot, and it was held, on principle, that as the income of the testator's estate, during the first five years after the testator's death, could never have been applicable in payment of the reversionary annuities, the annuitants in possession were not bound to bring into hotchpot sums received out of income.

In *Re Wilkins* (i), Pearson, J. held where an annuity was given free of duty and there was a deficiency, that the legacy duty payable on the sum apportioned to the annuitant should be deducted from the whole fund and the balance then divided proportionably. But it would seem the better view is that the legacy duty should be treated as an additional legacy and be added to the legacy for the purposes of abatement (k).

Legacies and annuities given free of duty.

The general rule is, that if there be a clear gift of a life interest and of a reversion, and the estate proves insufficient,

Abatement as between tenant for life and reversioner.

(e) [1900] 1 Ch. 162.

Eq. 683.

(f) *Todd v. Bielby*, (1859) 27 Beav. 353.

(A) [1908] 2 Ch. 424.

(i) (1884) 27 C. D. 708.

(g) *Potts v. Smith*, (1869) L. R. 8

(k) *Re Turnbull*, [1905] 1 Ch. 726.

As between
annuitant
and residue.

As between
sums payable
out of and
residue of a
specific fund.

each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee (*l*).

Where a specific fund is given upon trust for sale, and thereout to pay £600 to A. and £700 to B., and the legacy of £700 fails by B.'s death in the testator's lifetime, if the specific fund proves deficient to pay both sums of £600 and £700, there will be no abatement of the £600 legacy in favour of the residuary legatee, but it will be considered a first charge on the proceeds of sale (*m*).

But where a testator, in disposing of a specific fund, after he has given certain portions, comprises the remainder under the term "residue," if, on the construction, he intended the word "residue" to mean a fractional part of the whole, in that case, if the fund proves deficient, the loss will fall on all the persons interested in proportion to their shares, although the last portion was called the residue (*n*).

No precedence from
moral
obligation
to provide
for legatee :

nor by
direction to
pay legacy
immediately
or by a
certain time :

nor by saying
"out of the
first money"
or "in the
first place."

Near relationship, or that a man is morally bound to provide for his widow and children, does not of itself give to such a legatee priority over mere strangers, if the estate is insufficient to pay all legacies in full (*o*).

Moreover, a mere direction to pay a legacy immediately, or within one month, or within three months after a testator's decease, is no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is to be presumed that the testator intended all the legacies to be paid in full when he gave them (*p*).

So also saying "out of the first money belonging to me," or "imprimis," or "in the first place," is treated, apart from any contrary context, as only consequential to the direction that the legacy should be paid immediately, and such expressions

(*l*) *Croly v. Weld*, (1853) 3 De G. M. & G. 993, 995.

(*m*) *Re Tunno*, (1890) 45 C. D. 66.

(*n*) *Page v. Leapingwell*, (1812) 18 Ves. 463, and see *De Lisle v. Hodges*,

(1874) L. R. 17 Eq. 440.

(*o*) *Re Schweder's Estate*, [1891] 3 Ch. 44.

(*p*) *Ibid.*

are consistent with the presumed intention that all shall be equally paid in their order (*q*).

A legacy to an executor for his trouble in the conduct and management of the testator's estate has no priority over other legacies and must abate (*r*). Legacy to executor.

But where a legacy is given as a price for the relinquishment of a right to dower, the legatee is considered in the nature of a purchaser and entitled to priority, and consequently not liable to abate proportionately with other legacies; and it makes no difference that the legacy should exceed in value the right relinquished, or be the only consideration, or merely part of the consideration (*s*). The rule, however, being founded on her right to dower has no application where the widow had no such right, as where the testator left no real estate, or effectually devised the whole of his real estate (*t*). Legacy given as price for relinquishment of dower.

In *Re Wedmore* (*u*), Kekewich, J. decided that this principle was inapplicable to the case of a legacy given in satisfaction of an ascertained debt, and that if the legatee claims under the Will he takes the legacy subject to the usual rules of administration which affect all legacies; and the learned judge stated that there was no case among the authorities referred to which touched the question of debt. There are, however, authorities that the principle of treating the legatee as purchaser would not apply if the legatee had not any legal claim against the testator; as if no debt was actually due, but accounts had subsisted between the testator and the legatee, and the legacy was given on condition that the legatee should execute a general release (*x*); or if the legatees were creditors with whom the testator had formerly compounded, they having released their debts (*y*); or if the debts were the debts of a relative and not of the testator (*z*). Legacy given in satisfaction of ascertained debt.

A preferential legatee, even though the legatee be Preferential legatee not entitled until debts are satisfied.

(*q*) *Blower v. Morret*, (1752) 2 Ves. Sen. 420; *Beaston v. Booth*, (1819) 4 Madd. 161.

(*r*) *Duncan v. Watts*, (1853) 16 Beav. 204.

(*s*) *Heath v. Dendy*, (1826) 1 Russ. 543.

(*t*) *Re Greenwood*, [1892] 2 Ch. 295.

(*u*) [1907] 2 Ch. 277.

(*x*) *Davies v. Bush*, (1831) 1 You. 341.

(*y*) *Coppin v. Coppin*, (1725) 2 P. Wms. 296.

(*z*) *Shirt v. Westby*, (1809) 16 Ves. 393.

considered as a purchaser, is not entitled to payment until after all the debts are satisfied (a).

When legacies in first part of Will may have precedence of subsequent legacies.

Where a testator by Will gave several legacies, and afterwards in the same Will saying that he apprehended there would be a surplus, therefore gave further legacies, it was held that the legacies given in the first part of the Will had preference in a case of deficiency, and that further legacies given by a codicil must be considered as given with the same apprehension of a surplus and could take place only out of the supposed surplus (b).

Demonstrative legacy has preference out of specific fund charged.

A demonstrative legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets; and in this the testator's intention is the principle: for it is inferred that he, in referring to specific parts of his estate for payment of particular legacies intended those legacies to be a preference to others which he had not so secured (c).

Specific and demonstrative legacies abate rateably.

When the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies, and a legatee entitled to a demonstrative legacy, in the nature of a specific legacy, must abate with the specific legatees (d).

The forgiveness by Will of a debt owing to the testator is a specific legacy, and not liable to abatement with general legacies (e).

Effect of direction to pay charitable legacies out of pure personality.

Where charitable legacies are directed to be paid out of the testator's pure personality, as a question of intention, it is held that this does not relieve the pure personality from its obligation to contribute rateably with the rest of the estate to the burden of the administration charges, consequently such charges must be paid rateably out of the whole estate, and the charitable legatees will then take what remains of the pure personality in part payment of their legacies (f).

(a) *Re Lawley*, [1902] 2 Ch. 799, 808.

(b) *Att.-Gen. v. Robins*, (1722) 2 P. Wms. 23, followed in *Stammers v. Halliley*, (1841) 12 Sim. 42.

(c) *Williams* (10th ed.) 1100, quoted by Lord Truro in *Robinson v. Geldard*,

(1852) 3 Mac. & G. 735, 745; see also per Kindersley, V.-C., in *Sellon v. Watts*, (1861) 9 W. R. 847.

(d) *Williams* (10th ed.) 1100.

(e) *Re Wedmore*, [1907] 2 Ch. 277.

(f) *Beaumont v. Oliveira*, (1869) L. R. 4 Ch. 309.

CANADIAN NOTES.

Where the assets are not sufficient to pay all the legacies in full they must all abate in proportion. *Coleman v. Whitehead* (1852), 3 Gr. 227.

In *Lindsay v. Waldbrook* (1897), 20 A.R. 604 the general rule of equality among legatees was applied, and there not being sufficient to pay all the legacies in full it was ordered that all should abate, although there was a direction first to set apart one and then to pay others.

Where a special fund is set apart to produce the legacy the general rule does not apply and that legacy does not abate. See *King v. Yorston* (1895), 27 O.R. 1.

A pecuniary legacy and a provision for maintenance abate ratably. *Cook v. Noble* (1887), 12 O.R. 81.

Where there is a deficiency of assets of an estate to pay all the bequests in full the onus is on the parties claiming priority to shew conclusively from the will an intention that, in case of abatement of legacies, a distinction should be made in their favour. *Re Estate D. Waddell* (1896), 29 N.S.R. 19; *Re Battershall* (1907), 10 O.W.R. 933.

Onus on party claiming priority.

Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not, in this country, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. *Anderson v. Dougall* (1868), 15 Gr. 405. And see *Hellem v. Severs* (1876), 24 Gr. 320.

Where a mixed fund was given to charities, the legacies abated in the proportion which the amount of the realty and impure personalty bore to the pure personalty. *Re Staebler* (1894), 21 A.R. 266. See *Law v. Acton*, 14 Man. R. 246.

There can be no marshalling of assets in favour of a charity. *Becher v. Hoare* (1884), 8 O.R. 328.

Marshalling of assets.

The provision for the widow of a testator and certain legacies being charged upon real estate which it was apprehended might prove deficient, the legacies, not the provision for the widow, were in such case ordered to be abated ratably. *Becker v. Hammond* (1866), 12 Gr. 485; see *Koch v. Heisey* (1895), 26 O.R. 87.

An annuity not payable out of corpus, and a pecuniary legacy abate ratably. *Wilson v. Dalton* (1875), 22 Gr. 160.

A testator, by certain clauses of his will, devised and bequeathed property to some of his children, adding to each of these clauses a statement of the value of the property mentioned in the clause. By another clause he devised certain land to his daughter Margaret, subject to a payment of a legacy of \$200 to her daughter. He did not add to this clause a statement of the value of the land. The will provided that in case of deficiency in the estate each legatee should be liable to abatement, but that in the event of a surplus, "the same shall be divided equally between each." There was residue. Held, that the stated valuations were not intended to be the basis for abatement, and that Margaret and her daughter were entitled to participate in the surplus, the devisees and legatees taking share and share alike. *Patterson v. Hueston et al.* (1885), 40 N.S.R. 4.

A testator, out of the proceeds of his real and personal estate, gave to one son \$200, to another \$100, and to the third \$1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of \$100, and gave an additional sum of \$100 to the first named son, the household furniture to be equally divided between his two daughters last named in the will. Held, that these legacies were specific and not merely demonstrative, and if the fund was insufficient to pay them all they must abate proportionately. *Bleeker v. White* (1876), 23 Gr. 163. For an instance of a demonstrative, as distinguished from a specific, legacy see *Day v. Harris* (1882), 1 O.E. 147; *Re Dunn* (1904), 7 O.L.R. 560.

Legacies
specific
and demon-
strative.

CHAPTER XXXVIII.

OF MARSHALLING OF ASSETS.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person, having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (a).

General principle.

Inasmuch as since 3 & 4 Will. IV. c. 104 all real estate is assets to be administered in Courts of Equity for the payment of debts, it would seem that marshalling assets in favour of creditors is no longer necessary, except that where judgment or other creditors have received part of their debts in priority out of legal assets they are not allowed to receive anything out of the equitable assets without bringing into hotchpot what they have so received in priority (b).

Marshalling in favour of creditors no longer necessary, except in respect of legal and equitable assets.

Where one legatee has two funds to resort to for the payment of his legacy in full, and another legatee has only the personal estate or one fund to resort to, the Court presumes that the intention of the testator is that all should be paid in full, and therefore marshals the assets. Consequently, where one legatee has a charge upon real estate and the other has no such charge, and the personal estate is not sufficient to satisfy both, the legatee who has a charge shall be paid out of the land in order to leave the personal estate to the other who had no other fund (c).

Marshalling in favour of legatees.

So also in the case of two demonstrative legacies, one payable out of fund A, and the other out of fund A and fund

(a) Williams (10th ed.) 1337; Aldrich v. Cooper, (1805) 8 Ves. 382 388; Dolphin v. Aylward, (1870) L. R. 4 H. L. 486, 505; Sellon v. Watts (1861) 9 W. R. 847, 848.

(b) See Seton (6th ed.) 1675; Haslewood v. Pope, (1734) 3 P. Wms. 323.

(c) Scales v. Collins, (1852) 9 Hare 656.

B, the party who has a charge on both funds must exhaust that first upon which the other has no charge (d).

Assets not marshalled in favour of charitable bequests.

But the Court will not marshal assets in favour of a charitable bequest by throwing debts, funeral and testamentary expenses upon the mixed personalty in exoneration of the pure personalty (e).

Marshalling for adjusting rights of beneficiaries.

Where creditors have resorted to assets for satisfying their claims out of the prescribed order in which such assets are liable thereto, as between the persons beneficially interested in the assets, the remaining assets will be marshalled so as to adjust the rights of the beneficiaries.

Order of application of assets in payment of debts.

The order in which the assets should be applied in payment of debts is as follows (f) :

(1) Residuary personalty.

1. The general or residuary personalty not specifically bequeathed or exonerated or exempted (g).

Lapsed share applicable in same order as if legatee had survived.

It makes no difference whether the residue be wholly given or wholly undisposed of, or partly given and partly undisposed of, the thing that is taken is of the same quality. The residue for distribution is what remains after payment of debts and all the expenses of administering the estate (h). Consequently, a lapsed share is applicable in the same order and manner and to the same extent as if the legatee had survived, and the next of kin are entitled to what the deceased legatee would have taken had he survived the testator (i).

So where a gift of a share to a charity failed except as to the pure personalty, it was held that the costs of an administration suit must be paid out of the general estate (k).

To exonerate personal estate not sufficient to charge real estate.

In order to exonerate the personal estate from payment of debts and legacies it is necessary not merely to charge the

(d) *Sellon v. Watts*, (1861) 9 W. R. 847.

(e) *Robinson v. Geldard*, (1850) 3 Mac. & G. 735; *Beaumont v. Oliveira*, (1869) L. R. 4 Ch. 309; and see form of order, *ibid.*, p. 319, and *Seton* (6th ed.) p. 1335.

(f) See *Williams* (10th ed.) 1343, and *Seton* (6th ed.) p. 1672.

(g) *Manning v. Spooner*, (1796) 3

Ves. 117; *Harwood v. Oglander*, (1800) 8 Ves. 124.

(h) *Shuttleworth v. Howarth*, (1841) Cr. & P. 228; *Elborne v. Goode*, (1844) 14 Sim. 165, 178.

(i) *Fisher v. Fisher*, (1838) 2 Keen 610; *Trethewy v. Helyar*, (1876), 4 C. D. 53.

(k) *Blann v. Bell*, (1877) 7 C. D. 382.

real estate but the Will must exempt the personal estate—not necessarily by express words but by showing an intention beyond all doubt (*l*).

There would seem to be no authority which makes general personal estate, comprized in a residuary bequest, the primary fund for the payment of debts as against personal estate specifically appropriated to that purpose (*m*). But the exoneration of the general personal estate will not operate if the residue is undisposed of. So that where there is a specific bequest of chattels in trust to sell, and in the first place to pay thereout the debts and then to divide the residue among certain persons, and there is no general residuary gift of personal estate, the debts are primarily payable out of the general residue (*n*).

Personal estate specifically appropriated.

It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees; and, therefore, if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator, or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration (*o*).

Charge of real estate in exoneration of personal estate does not exonerate lapsed share.

In *Kilford v. Blaney* (*p*), Fry, L.J., stated that in his view the above rule is only a branch of the more general principle—that where the gift to the person intended to be benefited by the exoneration fails the exoneration itself fails, the right to the benefit of the exoneration being in fact a part of the legacy which fails and that that principle applies whether the property dealt with be realty or personalty.

(*l*) See note to *Lutkins v. Leigh*, (1734) Cas. temp. Talbot, 53; *Trott v. Buchanan*, (1885) 28 C. D. 446, 453.

(*m*) *Trott v. Buchanan*, *ubi sup.*, at p. 456.

(*n*) *Newbegin v. Bell*, (1857) 23

Beav. 386; *Hewett v. Snare*, (1847) 1 De G. & Sm. 333; *Re Grainger*, [1900] 2 Ch. 756 [1902] A. C. 1.

(*o*) *Dacre v. Patrickson*, (1860) 1 Dr. & Sm. 182, 187.

(*p*) (1885) 31 C. D. 56, 66.

Mixed fund
of realty and
personalty:
how appor-
tionment
effected on
failure of
trusts.

Where residuary real and personal estate was given upon trust for sale and out of the proceeds to pay debts, and certain shares of the residue were undisposed of, and the only real estate forming part of the residue consisted of a contingent reversion created by the Will itself expectant on prior life interests given by the Will in the same real estate, upon falling in of the real estate it was held that the debt ought to be borne by the realty and personalty in the proportion which the proceeds of sale of the realty which fell into residue bore to the personalty, and not according to the value of the contingent reversionary interest in the real estate at a year from the testator's death as in the case of a reversionary interest of which the testator was possessed at the date of his death (g).

2. Real estates particularly appropriated to or devised in trust for, and not merely charged with, the payment of debts (r).

8. Real estates descended, whether acquired before or after the making of the Will (s).

4. Real estates devised, charged with the payment of debts (t).

Where a testator gives a specific or a pecuniary legacy and devises lands to pay his debts, if a simple contract creditor comes upon the personal estate, and exhausts it so far as to break in upon the specific or pecuniary legacy, the legatee shall stand in the place of the creditor to receive satisfaction out of the fund to be raised for payment of debts (u). The Act 8 & 4 Will. IV. c. 104 has not affected the law in this respect. The question now, as before the Act, is one simply of intention on the whole of the Will; and a mere charge of debts upon the real estate, or a mere devise of the real estate subject to the testator's debts without any trust, is sufficient

(g) *Re Moore*, (1907) W. N. 181.

(r) *Manning v. Spooner*, *ubi sup.*;
Harwood v. Oglander, *ubi sup.*;
Phillips v. Parry, (1856) 22 Beav. 279;
Stead v. Hardaker, (1873) L. R. 15
Eq. 175.

(s) *Wride v. Clark*, (1787) 2 Bro.
C. C. 261, n.; *Harwood v. Oglander*,

ubi sup.; *Row v. Row*, (1869) L. R.
7 Eq. 414; *Stead v. Hardaker*, *ubi sup.*,
per Malins, V.-C., at p. 177.

(t) *Wride v. Clark*, *ubi sup.*; *Har-
wood v. Oglander*, *ubi sup.*

(u) *Haslewood v. Pope*, (1784) 3
P. Wms. 323; *Surtees v. Parkin*, (1854)
19 Beav. 406.

(2) Real
estate appro-
priated for
payment of
debts.

(3) Real
estate
descended.

(4) Real
estate
charged
with payment
of debts.

in the event of the personal estate proving inadequate to pay both debts and legacies to entitle the legatees to come upon the real estate so far as the personalty has been applied in payment of debts (*x*). Moreover, although Part I. of the Land Transfer Act, 1897, has rendered unnecessary an express charge of debts on real estate, it has not affected the application of the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts and the personalty is exhausted in paying debts (*y*).

5. General pecuniary legacies *pro rata* (*z*).

(5) General pecuniary legacies.

As to demonstrative legacies, if the fund provided for their payment is insufficient, the balance is to be treated as a general legacy to be paid *pari passu* out of the general assets (*a*).

6. Specific and residuary devises and specific legacies *pro rata* (*b*).

(6) Real estate specifically devised and specific legacies.
Lapsed share of real estate which descends.

A lapsed share of real estate is applicable for payment of debts in the same order as the devised estates and not till after real estate descended (*c*).

So also when a life interest properly given by a Will becomes under the terms of the Will subsequently forfeited, and then by rule of law descends to the testator's heir, the heir takes exactly that which the tenant for life would have taken if his life estate had not been forfeited (*d*).

Land not charged with payment of debts which escheat to the lord for want of heirs are assets to pay debts under 3 & 4 Will. IV. c. 104, although the lord is neither heir nor devisee, but it seems to be doubtful whether the same are to be applied in priority to or *pari passu* with specifically devised lands (*e*).

Lands escheated.

A residuary devise of real estate is still specific notwith-

Residuary devise is specific.

(*x*) *Richard v. Barrett*, (1857) 3 K. & J. 289. 847.

(*y*) *Re Kempster*, [1906] 1 Ch. 446.

(*z*) *Farquharson v. Floyer*, (1876) 3 C. D. 109; *Re Stokes*, (1892) 87 L. T. (N. S.) 223; *Re Salt*, [1895] 2 Ch. 208; *Re Roberts*, [1902] 2 Ch. 834.

(*a*) *Sellon v. Watts*, (1861) 9 W. R.

(*b*) *Manning v. Spooner*, *ubi sup.*

(*c*) *Wood v. Ordish*, (1855) 3 Sm. & G. 125.

(*d*) *Hurst v. Hurst*, (1884) 28 C. D. 159.

(*e*) *Evans v. Brown*, (1842) 5 Beav. 114.

standing s. 24 of the Wills Act. Therefore, where the personal estate is insufficient for the payment of debts, the specific devisees must contribute rateably with the residuary devisee (f).

Mode of
valuing real
estate
charged with
portions.

As between real estate devised charged with portions and specifically bequeathed personal estate, the former must contribute in proportion to its full value, and not in proportion to its value less the amount of the portions (g).

Mode of
valuing
residuary
real estate
charged with
legacies.

So also where pecuniary legacies are charged upon the residuary real estate (under the doctrine of *Greville v. Browne* (h)), and the personal estate is insufficient for payment of debts in full, the pecuniary legacies are not liable to contribute to the debts, but the residuary real estate must contribute rateably with the specific devisees and legatees, according to its full value without deducting the amount of the pecuniary legacies (i).

Distinction
between
annuities
issuing out
of land and
legacies
payable out
of the pro-
ceeds of sale
of land.

The gift of a rent charge or annuity issuing out of land being an interest in the land itself, is necessarily specific, but general legacies do not become specific because they are payable out of the proceeds of real estate in case of a deficiency of personal estate. Consequently, annuities so given are entitled to priority over such legacies (k).

Effect of
Locke King's
Act.

Further, devisees of mortgaged property are not entitled to compete with pecuniary legatees. After *Lutkins v. Leigh* (l) and before Locke King's Act (m) it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the Will entitled as against a residuary legatee to have the mortgage debt paid off out of residue; and if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held on the doctrine of marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty. The effect of Locke King's Act was

(f) *Lancefield v. Iggulien*, (1874) L. R. 10 Ch. 136.

(g) *Re Saunders-Davies*, (1887) 34 C. D. 482.

(h) (1859) 7 H. L. C. 689.

(i) *Re Bawden*, [1894] 1 Ch. 693.

(k) *Creed v. Creed*, (1844) 11 Cl. & F. 491.

(l) (1734) Cas. t. Tal. 53.

(m) 17 & 18 Vict. c. 113.

to benefit the residuary legatee and not to prejudice any rights the pecuniary legatee had in equity (n).

The Act 40 & 41 Vict. c. 34, which amended the real Estate Charges Acts, 1854 (17 & 18 Vict. c. 118, known as Locke King's Act) and 1867 (30 & 31 Vict. c. 69) (o) provides that as to a testator or intestate dying after the 31st December, 1877, seized or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money, the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall within the meaning of the previous Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate (p).

Provisions of
40 & 41 Vict.
c. 34.

Where by reason of the testator having expressed a contrary intention the application of Locke King's Act is excluded, then the old law applies, and the heir or devisee is entitled, subject to any other direction express or implied contained in the Will, to have the debt discharged out of the residuary personalty, whether there was a covenant or bond accompanying the mortgage or not. But this rule did not apply where the debt was not the debt of the ancestor or testator, but the estate came to him charged with the debt, unless subsequently the ancestor or testator had made the debt his own. An ancestor or testator who on a transfer of mortgage entered into a personal covenant to pay the mortgage debt (q), or who on a sale of part of an estate covenanted with the purchaser for indemnity (r), did not thereby make the mortgage debt his

Effect of
contrary
intention
being
expressed.

(n) *Re Smith*, [1899] 1 Ch. 365.

(o) With regard to these Acts and the cases thereon, see Williams (10th ed.) 1324 *et seq.*, also *Re Bowerman*, (1908) W. N. 137.

(p) As to contrary intention, see *Re Valpy*, [1906] 1 Ch. 531.

(q) *Waring v. Ward*, (1802) 7 Ves. 336.

(r) *Barham v. Earl of Thanet*, (1834) 3 My. & K. 607.

own, but if on a transfer of mortgage the advance was made by the transferee subject to a proviso for redemption altogether different from the prior equity of redemption, it was held to be a new mortgage (s).

Right of heir or devisee to have contract for erection of buildings completed.

Where a person has entered into a contract for the erection of buildings on land belonging to him, and dies before the buildings are completed, the heir-at-law or devisee as the case may be is entitled to have the buildings completed out of the general personal estate (t).

Right of specific legatee of chattels to have legacy redeemed :

A specific legatee is entitled to have his legacy redeemed from charges created by the testator (as distinguished from charges incidental to the property) at the expense of the testator's general estate, or, if the property is not redeemed, to have compensation out of the general estate to the amount of the legacy (u).

so legatee of mortgaged share of proceeds of sale of real estate

The same principle applies to a mortgaged share of proceeds of sale of real estate directed to be converted, since it comes to the mortgagor as personal estate, and is not an interest in land within the meaning of Locke King's Act (x). The same remark applies to debentures issued by a company (y).

or of debentures of a company.

In *Re Butler* (s) it was held that although the general law is that the legatee of a chattel, or other personal estate, takes with it the privilege of having any debt charged on it paid out of the personal estate, yet where the general personal estate of a testator not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance; and a general direction in the Will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the devisees of real estate (a).

(s) *Barham v. Earl of Thanet*, (1834) 3 My. & K. 607; and see further on this subject, Coote on Mortgages (7th ed.), p. 775, and Watson's Comp. of Equity (2nd ed.), p. 1413.

(t) *Cooper v. Jarman*, (1866) L. R. 3 Eq. 98; *Re Day*, [1898] 2 Ch. 510.

(u) *Bothamley v. Sherson*, (1875) L. R. 20 Eq. 304.

(x) *Lewis v. Lewis*, (1871) L. R. 13 Eq. 218.

(y) *Re Chantrell*, (1907) W. N. 213.

(z) [1894] 3 Ch. 250.

(a) *Ibid.*

7. Real and personal property which the testator has power to appoint, and which he has appointed, by his Will.

(7) Real and personal property appointed by Will.

Personal estate, or real estate appointed by a testator, is to be applied only in aid of the assets which are really the property of the testator (b). These are not general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted (c). But where a power of appointment is exercised by a general bequest in a Will the property appointed is included in and passes by the bequest according to the terms of the Will, and not as if a separate execution of the power were read into the Will. The property is therefore *not* necessarily postponed, as a fund liable for payment of the testator's debts, to other assets of the testator (d).

Both real and personal estate subject to general powers of appointment become assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and it makes no difference whether the power is exercised by deed or by Will only (e). Voluntary conveyances are void as against creditors under 13 Eliz. c. 5, if the settlor was indebted at the time of making such conveyance.

An appointment of an executor without more would not, it would seem, under s. 27 of the Wills Act make the fund assets. But where a testator, with a general power of appointment, makes a Will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient; and where a testator with such a power gives legacies and appoints an executor, he must be taken as exercising the power to the

What sufficient to show intention to exercise power.

(b) *Fleming v. Buchanan*, (1853) 3 D. M. & G. 976.

Ch. 152.

(c) Per Ld. Lindley in *Beyfus v. Lawley*, [1903] A. C. 411, affirming *Re Lawley*, [1902] 2 Ch. 799, and approving *Fleming v. Buchanan*, *ubi sup.*

(d) *Williams v. Withams*, [1900] 1

(e) *Farwell on Powers* (2nd ed.), p. 284, referring to *Fleming v. Buchanan*, *ubi sup.*, and *Williams v. Lomas*, (1852) 16 Beav. 1. As to the distinction between power and property, see *Ex parte Gilchrist*, (1886) 17 Q. B. D. 521, 530.

extent to which the fund subject to it is required to make the legacies effective (*f*).

When
appointed
fund assets
for all
purposes.

Although the law is now settled that where the donee of a general power of appointment over a fund of personalty makes an appointment of the fund by Will and appoints an executor, the executor is entitled to receive the appointed fund (*g*), yet whether the testator intended to make the fund his own so as to take it for all purposes away from the persons entitled in default of appointment is a question of intention. The bare exercise of the power and the appointment of executor without more is not sufficient evidence of such an intention (*h*). Nor is an express direction to pay debts coupled with the appointment of an executor (*i*). And in general, where the appointment is for a limited purpose or a purpose which fails, it would seem, on principle, that there should be no appointment at all, or none beyond the limited purpose (*k*). The circumstance that a testator expressly distinguishes between the appointed fund and his own property may assist the case of those claiming in default of appointment (*l*).

Paraphernalia.

8. The wife's paraphernalia (*m*).

(*f*) *Re Davies' Trusts*, (1871) L. R. 112.
13 Eq. 163, 166.

(*g*) *Re Hoskin's Trusts*, (1877) 6
C. D. 281.

(*h*) *Re Thurston*, (1886) 32 C. D.
508.

(*i*) *Laing v. Cowan*, (1857) 24 Beav.

(*k*) *Re Davies' Trusts, ubi sup.*

(*l*) *Re Boyd*, [1897] 2 Ch. 232.

(*m*) *Snelson v. Corbet*, (1746) 3
Atk. 369; *Aldrich v. Cooper*, (1803) 8
Ves. 382, 397.

CHAPTER XXXIX.

OF THE RESIDUE.

SECT. 1.—*Title to Residue.*

THE substantial title of the residuary legatee or next-of-kin to the residue is complete at the death of the testator or intestate. The rule of law, or the rule laid down by the statute, which requires the conversion of an estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division (a).

Substantial title complete at death of testator or intestate.

The Statute of Distributions must be looked at as in substance nothing more than a Will made by the legislature for the intestate, and his next-of-kin stand with regard to his personal estate in the same condition as does a residuary legatee under a Will (b).

Next-of-kin under the statute stand in same position as residuary legatees under Will.

A residuary legatee has a right to insist that, in the course of the first year after the testator's death the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses, so that the clear residue may be ascertained and paid over to him, or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is the duty of the executor to sell the personal estate, or at all events so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses, and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date that the right of those entitled to life interests in it commences, and, therefore, when eventually the whole estate is realized, it becomes necessary to ascertain retrospectively what was the residue at the end of

Residue to be ascertained within first year.

Rights of persons having life interests ascertained at the end of a year.

(a) *Cooper v. Cooper*, (1874) L. R. 7 H. L. 53.

(b) *Ibid.*

the year, attributing a due proportion of the sum realized after the end of the year to capital and a due proportion to interest (c).

No distribu-
tion under
the statute
till the end
of a year.

Sect. 8 of the Statute of Distributions (22 & 23 Car. II. c. 10) enacts to the end that a due regard be had to creditors, that no distribution of the goods of any person dying intestate be made till one year after the intestate's death.

Residuary
legatees or
next-of-kin
may agree to
divide in
specie.

When there are several residuary legatees, or several entitled under the statute, when the residue has been ascertained, they may agree between themselves to take any portion of the estate in specie, or an appropriation may be made of particular portions in satisfaction of any share. The only right they can enforce adversely is to have the administration completed and the residuary estate ascertained and realized either wholly or so far as may be necessary. One of several cannot claim any part of the estate in specie, but only to a proportion of the proceeds after realization (d).

One of several
cannot claim
adversely any
part in specie.

As to real estate, the Land Transfer Act, 1897, provides as follows:—

Effect of
Land Transfer
Act, 1897, s. 2
(3), as to real
estate.

Sect. 2 (8). "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies."

Sect. 8 makes provision for the personal representative's assent to any devise, and for the conveyance of land to any person entitled thereto as heir, devisee, or otherwise (e).

Statutory
power to
appropriate.

Sect. 4 (1) provides that "The personal representatives of a deceased person may, in the absence of any express

(c) *Wightwick v. Lord*, (1857) 6 H. L. C. 217, 226.

(d) *Ld. Sudeley v. Att.-Gen.*, [1896]

1 Q. B. 354; [1897] A. C. 11, 21.

(e) See *ante*, p. 475.

provision to the contrary contained in the Will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court."

This section applies to all residuary estate whether real or personal (*f*).

Where there is a trust for sale and conversion this section seems to have made no difference to that which was the power before the Act. The principle being that where the trustee is directed to convert and to pay the beneficiary money, it is competent for him to agree to sell to the beneficiary the property against the money which otherwise he would have to pay to him; and the same principle would apply whenever the circumstances are such that the executor would be bound to turn assets of the testator into money and apply it to the legacy in the ordinary course of administration apart from any trust for sale and conversion (*g*).

Power to appropriate apart from the statute.

In *Re Richardson* (*h*) there was no trust to convert, but simply a gift of the residuary estate to certain persons in shares, and it was held that the executors might appropriate specific assets to a trust share of residue or transfer them to the legatee of a share in advance of final division. The Act of 1897 may possibly apply to cases of this kind (*i*).

(*f*) *Re Beverly*, [1901] 1 Ch. 681.

(*g*) *Ibid.*

(*h*) [1896] 1 Ch. 512.

(*i*) See *Re Beverly* *ubi sup.* per Buckley, J., at p. 687.

SECT. 2.—Where residue is settled.

Rule in *Howe v. Earl of Dartmouth*, as to sale and investment where residuary personal estate is to be enjoyed by several in succession.

The rule as laid down by Lord Eldon in *Howe v. Earl of Dartmouth* (k) and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering v. Pickering* (l), amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous (m).

Rule not applicable where intention indicated that property should be enjoyed in specie.

But it must be borne in mind that the rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it (n).

The rule must be applied unless upon the fair construction of the Will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case (o).

Effect of express power to retain.

It would seem that the rule does not apply where the Will contains a power to retain investments belonging to the testator at his death, since the obligation to convert and the power to retain at discretion are inconsistent one with the other.

(k) (1802) 7 Ves. 137.

(l) (1839) 4 My. & Cr. 389.

(m) *Macdonald v. Irvine*, (1878) 8 C. D. 101, 112.

(n) *Ibid.*

(o) *Ibid.* p. 124; and see *Re Pitcairn*, [1896] 2 Ch. 199, 205.

But in this respect a distinction has been drawn in many cases between wasting and hazardous securities. In *Re Sheldon* (p) where the securities retained were not of a wasting nature it was held that the tenant for life was entitled to receive the whole income. This was followed in *Re Bates* (q) where the securities retained were of a hazardous character, but not wasting securities; and again in *Re Wilson* (r) where trustees under such a power retained many securities not specifically authorised but no wasting securities.

In *Porter v. Baddeley* (s) it was held that the application of the rule was not excluded by such a power to retain in the case of long annuities being of a wasting character. But in *Gray v. Siggers* (t) being a bequest of short leaseholds it was held that the power to retain took the case out of the general rule as to conversion of perishable property.

In *Re Bates* (u), Kekewich, J., considered that the discretionary power to retain, when exercised by the trustees added to the authorised trust securities, and expressed the opinion that if it had been necessary to decide whether the trustees might retain wasting securities and pay the income to the tenant for life, he should, as at present advised, say they might. Following this decision it was held in *Re Wilson* (x), by Swinfen Eady, J., that where a Will contains no trust for conversion, and the life tenant of residue or of a legacy is given the entire income thereof, he is entitled to the income of unauthorised permanent securities retained or appropriated by the trustees under a power of retainer and appropriation.

Where trustees have a discretionary power to retain investments, which otherwise in accordance with the rule in *Howe v. Earl of Dartmouth* ought to be sold, in order to exclude the rule they must properly exercise the discretion to retain. In the absence of express power trustees cannot exercise a power of management merely to benefit one beneficiary at the expense

(p) (1888) 39 C. D. 50.

(q) [1907] 1 Ch. 22.

(r) [1907] 1 Ch. 394.

(s) (1877) 5 C. D. 542.

(t) (1880) 15 C. D. 75.

(u) *Ubi sup.*

(x) *Ubi sup.*

of another. Further, if by an oversight the discretionary power is not exercised at all, as if the question of converting a reversionary interest in property to the income of which the tenant for life was herself entitled under another Will, never crossed their minds, or if the trustees, if they had thought of it, could not have properly refused to convert the reversionary interest, then the property ought to have been sold in accordance with the rule (y).

Exclusion of rule where Will fixes time of sale or power to sell is left to discretion of others.

When the time of sale is fixed by the Will, either by reference to a given number of years after the testator's death, or by the falling in of a life, or anything of that kind, or when it is left to the discretion of someone else to say when the sale is to take place, the testator himself having by his Will provided for the sale, there is no rule of the Court which requires that the sale should be made in a different way or under different circumstances from those indicated by the Will. Consequently in *Re Pitcairn* (x), where part of the testator's property consisted of the reversion, expectant on the death of his mother, of funds settled on her marriage of which she was tenant for life, and by his Will he gave all his property to trustees upon trust for his mother for life, with remainder to other persons with a power to the trustees, if and when they should consider it expedient, to sell and dispose of all or any part of his estate, it was held that the discretionary power of sale given by the Will to the trustees was inconsistent with any intention of the testator that the Court should realize the reversionary property and excluded the application of the rule in *Howe v. Earl of Dartmouth*, and that after the death of the mother her personal representatives were not entitled to any part of the proceeds of the reversion.

Rule in *Allhusen v. Whittell*, as to adjusting rights of tenant for life of residue.

Every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts and which is found to be in a proper state of investment. He is entitled to the income of that property from the

(y) *Rowls v. Bebb*, [1900] 2 Ch. 107.

(x) [1896] 2 Ch. 199.

death of the testator. He is not entitled to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever. Therefore, although the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration, yet for the purpose of adjusting the rights between the parties the executors will be taken by the Court as having applied in payment of debts, legacies and other charges during the year such a portion of the fund as together with the income of that portion for one year was necessary for the purpose (a).

This rule is not affected by the circumstance that the debts and legacies have been paid before the expiration of a year from the testator's death, and that the income from the continuance of the estate in the business carried on by the testator has greatly exceeded 5 per cent., so that the rule operates unfavourably to the tenant for life (b).

Where the personal estate is insufficient, and resort is had to the proceeds of real estate to pay debts, in adjusting the rights of the tenant for life and remainderman, the principle laid down in *Allhusen v. Whittell* (c) applies, but the tenant for life of the real estate must, as well during the first year after the testator's death as subsequently, keep down all the interest upon all the debts bearing interest and which have been ascertained to be a charge upon such estate (d).

Principle applied where resort is had to proceeds of real estate on deficiency of personal estate.

Where the debt consists of an annuity covenanted to be paid by the testator in his lifetime, there is a difference of judicial decision how the principle of *Allhusen v. Whittell* should be applied. In *Yates v. Yates* (e) and *Re Dawson* (f) it was held that the successive instalments of the annuities must be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's

Application of principle where debt consists of annuity covenanted to be paid by testator.

(a) *Allhusen v. Whittell*, (1867) L. R. 4 Eq. 295.

(b) *Lambert v. Lambert*, (1873) L. R. 16 Eq. 320.

(c) *Ubi sup.*

(d) *Marshall v. Crowther*, (1874) 2

C. D. 199.

(e) (1860) 28 Beav. 637, Romilly, M.R.

(f) [1906] 2 Ch. 211, Swinfen Eady, J.

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death. But in *Re Muffett* (g), *Re Harrison* (h), *Re Bacon* (i), and *Re Henry* (k), the principle applied was to treat the successive instalments as contingent debts which as they become payable must be paid out of capital by sale or mortgage of a sufficient part of the settled property. These cases were considered by Swinton Eady, J., in *Re Perkins* (l), and he held that the rule of *Allhusen v. Whittell* should be applied as each payment accrues, by calculating what sum with 8 per cent. simple interest to the day of payment would have met the particular instalment, and charging that sum to capital and the balance to income.

Where income-producing property directed by Will to be converted is retained for a time unconverted for the benefit of the estate, it is the practice of the Court to put a value on the property and to allow the tenant for life out of the income actually produced such an annual sum as in the opinion of the Court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received if the property had been sold and the proceeds properly invested (m).

In this respect there is no distinction whether the testator either leaves the Court to act under the rule in *Howe v. Earl of Dartmouth* or directs conversion himself (n).

The securities must be valued as at the time when they ought to have been converted, that is to say, immediately after the testator's death, if he has so directed, or at the expiration of a year from his death if he has given no direction (o).

The income produced over and above what the tenant for life is entitled to must be invested as capital and the tenant for life is entitled to the income of the invested fund (p).

Effect of retaining property unconverted for convenience of estate.

Securities to be valued as at the end of a year.

Income beyond what tenant for life entitled to, to be invested as capital.

(g) (1888) 39 C. D. 534.
(A) (1889) 43 C. D. 55.
(i) (1893) 62 L. J. Ch. 445.

(k) [1907] 1 Ch. 80.
(l) [1907] 2 Ch. 596.

(m) *Brown v. Gellatly*, (1867) L. R.

2 Ch. 751; *Wentworth v. Wentworth*, [1900] A. C. 171; *Re Woods*, [1904] 2 Ch. 4.

(n) *Re Woods*, *ubi sup.*, at p. 15.

(o) *Re Woods*, *ubi sup.*

(p) *Ibid.*

The rule laid down by Lord Lyndhurst in *Dimes v. Scott* (q) is that where by the language of the Will the executors are expressly directed to convert the personal estate into money and to invest in government or real securities and it is not left to their discretion, the tenant for life is entitled to receive only the dividends which the stock if purchased one year after the testator's death would have produced, and the tenant for life is not entitled to the whole of the larger income produced by the investment retained by the executor without authority. During the first year after the testator's death the tenant for life is entitled, not to the interest on the unauthorised investment, but to the dividends on so much 8 per cent. stock as would have been produced by the conversion of the property at the end of the year.

Rule in *Dimes v. Scott* where executors are directed to convert and invest without any discretion.

Where there is an express trust for conversion and a power to retain securities of every kind, authorised and unauthorised, and there is no express gift of the income pending conversion, the general rule is that the tenant for life is entitled to the income of authorised securities, but not entitled to the income of unauthorised securities. In the latter case he is only entitled to interest, which is now fixed at the rate of 8 per cent. on their value at the testator's death. This rule applies to unauthorised securities whether of a wasting character or not (r).

Effect of express trust for conversion with power to retain.

The rule established in *Re Earl of Chesterfield's Trusts* (s) is that where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a

Rule in *Re Earl of Chesterfield's Trusts*, as to apportioning between capital and income outstanding personal estate on falling into possession.

(q) (1827) 4 Russ. 195.

(s) (1883) 24 C. D. 643.

(r) *Re Chator*, [1905] 1 Ch. 233.

life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income.

This rule extends to property which is not producing income, such as a reversionary interest, unless the trustees have justifiably postponed conversion (*t*).

In cases of this kind the interest is now calculated at the rate of 8 per cent. and not 4 per cent. (*u*).

In the case of a simple devise of real estate in trust for sale, until sale the tenant for life of the proceeds is entitled to the rents and profits only, provided the sale is not improperly postponed (*v*); and the rule is the same where real and personal estate are devised and bequeathed together and the proceeds are to be held as one fund (*rv*).

SECT. 8—Of what a Residuary Bequest consists.

The term "residuary legatee" *prima facie* means the person taking what the law calls the residue of the personal estate; but it is a term which must be fashioned and moulded by the context (*x*). Whether the testator had real estate or not at the date of his Will is material to enable the Court on the construction of the Will to determine whether the real estate did or did not pass to the person described as "residuary legatee" (*xx*).

(*t*) *Rowls v. Bebb*, [1900] 2 Ch. 107.

(*u*) *Ibid.*

(*r*) *Casamajor v. Strobe*, (1809) 19 Ves. 390 n; *Hope v. D'Hédouville*, [1893] 2 Ch. 361; *Re Searle*, [1900] 2 Ch. 829; *Re Earl of Darnley*, [1907] 1 Ch. 159.

(*rv*) *Re Earl of Darnley*, *ubi sup.*; *Re Oliver*, [1908] 2 Ch. 74.

(*x*) *Singleton v. Tomlinson*, (1878) 3 App. Cas. 404, 417, per Ld. Cairns; *Re Gibbs*, [1907] 1 Ch. 465.

(*xx*) *Re Methuen & Blores Contract*, (1881) 16 C. D. 696; *Re Morris*, (1894) W. N. 85; *Re Gibbs*, *ubi sup.*, 54; As to what expressions are sufficient to constitute a residuary legacy see Williams (10th ed.) 1195 *et seq.*

Interest now calculated at 8 per cent.

Until sale of real estate tenant for life entitled to rents.

Meaning of residuary legatee.

It had been long settled prior to the Wills Act, 1837, that a residuary bequest of personal estate (for it was otherwise as to real estate) carried, not only everything not disposed of, but everything that in the event turns out not to be disposed of, and that a presumption arises for the residuary legatee against every one except the particular legatee (*y*). In order to exclude from a general residuary gift a particular property belonging to the testator and not otherwise disposed of by the Will, it is necessary to find a plain and unequivocal intention on the part of the testator to exclude it (*z*). For instance, if the testator excepts specific property from the general gift, and makes no disposition by Will of the excepted property, the excepted property passes as on an intestacy (*a*).

What passes under residue.

By the Wills Act, 1837 (s. 24), every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will. And further (s. 25), unless a contrary intention shall appear a residuary devise shall include such real estate as shall be comprised in any devise which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise being incapable of taking effect.

Effect of Wills Act : Sect. 24. Will speaks from death of testator.

Sect. 25. Residuary devise includes any lapse or void devise.

By s. 27 of the Wills Act a general devise of the real estate or a general bequest of the personal estate of the testator shall be construed, as the case may be, to include any real estate or any personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the Will.

Sect. 27. General devise or bequest includes property over which testator had general power of appointment.

Sect. 27 does not apply to a power which is not general in regard to its objects, as such a power is not equivalent to ownership (*b*).

As to what is a general power within s. 27.

(*y*) Cambridge v. Rous, (1802) 8 Ves. 12, 25.

(*z*) *Re Bagot*, [1893] 3 Ch. 348.

(*a*) *Re Fraser*, [1904] 1 Ch. 111, 726.

(*b*) For the distinction between general and particular powers see Farwell on Powers (2nd ed.) p. 286.

A power to appoint to any person except an individual named (unless possibly the excepted individual should be dead at the time the power is exercised) is not a power within s. 27 (c).

A power to appoint by Will expressly referring to the power is not a power to appoint in any manner the donee may think proper within the meaning of s. 27 (d).

Fund not exhausted on exercise of power.

On the exercise of a general power, where the whole of the fund is not exhausted, questions arise whether there is a resulting trust in favour of the persons entitled in default of appointment under the instrument creating the power. This depends on whether the testator intended to make the fund part of his general estate. If the testator blends into one fund that which was his own property and that over which he had a general power of appointment, the whole being made subject to his debts, funeral and testamentary expenses, and there is a failure of the trusts of the blended fund by reason of the death of the residuary legatee in the lifetime of the testator, there is no resulting trust, but the next-of-kin of the testator will be entitled (e).

Meaning of "residue" of a specific fund.

In dealing with specific funds the term "residue" may have the meaning of an aliquot part of the whole, since where a testator is dealing with an ascertained fund, or assumes that property will produce a given sum, it is indifferent whether, after he has given certain portions, he specifies the remainder by stating its amount, or by comprising it under the term of "residue" (f). But where the testator does not know the amount of the fund, or it is impossible to ascertain the amount until the fund is realised, the term "residue" has its ordinary meaning of what remains of the fund after satisfying the fixed payments thereout, and is consequently subject to decrease or increment (g).

(e) *Re Byron's Settlement*, [1891] 3 Ch. 474.

(d) *Phillips v. Cayley*, (1889) 43 C. D. 222; *Re Davies*, [1892] 3 Ch. 63.

(e) *Re Marten*, [1902] 1 Ch. 314.

(f) *Page v. Leapingwell*, (1812) 18

Ves. 463; *Elwes v. Causton*, (1862) 30 Beav. 554.

(g) *De Lisle v. Hodges*, (1874) L. R. 17 Eq. 440; *De Quetteville v. De Quetteville*, (1905) 92 L. T. N. S. 758.

SECT. 4.—Of the Right of the Executor to Undisposed of Residue where Deceased has left no next-of-kin.

Prior to the Executor Act, 1839 (11 Geo. IV. & 1 Wm. IV. c. 40), it appears by the preamble to the Act that if a testator appointed executors and made no express disposition of the residue of his personal estate, the executors so appointed became by law entitled to the whole residue of such personal estate; and Courts of Equity had so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appeared to have been their testator's intention to exclude them from the beneficial interest therein, in which case they were held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions if the testator had died intestate (*h*).

Law prior to the Executors Act, 1830.

The Act provides (s. 1) that in such cases as to persons dying after the 1st September, 1830, the executors shall be deemed by Courts of Equity to be trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, unless it shall appear by the Will the persons appointed executors were intended to take such residue beneficially.

Executors are now trustees for next-of-kin unless intended to take beneficially.

Sect. 2 of the Act provides "that nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled in cases where there is not any who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of."

Application of the Act.

The only object and effect of the Act was to deprive the executor of that position which he had *virtute officii*, under which anybody claiming to get the residue from him had to discover something on the face of the Will to show that he was intended to be a trustee and not to take beneficially. In any case in which by construction the Courts held before that Act that he was, though a named executor, really a trustee, the Act has no operation; in other words, it only deals with

(*h*) Williams (10th ed.) 1218.

property which the executor could claim to get and retain solely *virtute officii* (i).

Further, the Act only applies as between an executor and next-of-kin. It has no application where, there being no next-of-kin, the question is raised whether the Crown is entitled or the executor can retain the residue beneficially (k).

In a case where there are no next-of-kin the executors are beneficially entitled to undisposed-of residue, unless the Will shows a contrary intention.

Such a contrary intention will not be inferred against the executor if being one of several executors a legacy is given to him alone (l), unless given to him for his care and trouble (m); but it will be inferred from the gift of a pecuniary legacy to a sole executor, or of equal pecuniary legacies to all the executors, but not from pecuniary legacies to them of unequal amounts. When once there is inequality, whether in respect of pecuniary legacies or in respect of specific legacies, then there is no presumption of a contrary intention sufficient to displace the legal title of the executors, and they will take the residue beneficially (n).

In the case of a sole executor there would seem to be no distinction whether the gift to him is a specific legacy or a pecuniary legacy as showing an intention that the executor should not take the residue (o).

So where personal property is bequeathed to the executors in trust they are precluded from claiming it for their own benefit, notwithstanding no trust is declared (p); and the presumption is against the executor whenever the character of trustee is plainly affixed to him, though not by express words (q); and if one of the executors is a trustee they are all trustees (r).

(i) *Re Roby*, [1908] 1 Ch. 71, 77.

(k) *Re Bacon's Will*, (1886) 31 C. D. 460.

(l) *Butler v. Bradford*, (1741) 2 Atk. 222.

(m) *Griffiths v. Hamilton*, (1806) 13 Ves. 298, 308.

(n) *Re Glukman*, [1908] 1 Ch. 552.

(o) *Bowker v. Hunter*, (1783) 1 Bro. C. C. 328, 331.

(p) *Taylor v. Hogarth*, (1844) 14 Sim. 8.

(q) *Williams* (10th ed.) 1220 and cases cited.

(r) *Griffiths v. Hamilton*, *ubi sup.*

Where Act does not apply, contrary intention may be inferred.

What is sufficient inference.

The executor is not entitled where the testator has ineffectually disposed of the residue, as if the gift of residue lapses or for any other reason fails (a).

SECT. 5.—*Of Distribution under the Statute.*

(1) *Of the Rights of the Wife and Children and Representatives of Deceased Children.*

Sect. 5 of the Statute of Distributions (22 & 23 Car. II. c. 10) provides "That all Ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: and in case any child other than the heir-at-law who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir-at-law notwithstanding any land that he shall have by descent or otherwise from the intestate is to have an equal part in the distribution with the rest of the children without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

22 & 23 Car.
II. c. 10, s. 5.

One-third
share to wife
and residue to
children and
representa-
tives of
deceased
children.

Children
(other than
heir) to have
equal shares
having regard
to advances.

(a) See Williams (10th ed.) 1222 and numerous cases cited.

Children of
intestate.

1. In case none of the intestate's children be dead (*t*).

If the intestate leave only one child the intestate's widow, if any, will have a third part and the child two-thirds, or if there is no widow the child will have the whole.

If the intestate leave several children, the intestate's widow, if any, will have a third part and the children two-thirds, or if there is no widow, the whole equally among them.

Brothers and sisters, whether of the whole blood or half-blood, are equally of kin to the intestate and take equally.

A posthumous child is also entitled.

Remoter issue
of intestate.

2. In case any child of the intestate be dead leaving issue, such issue, in equal degree, represent *per stirpes* the deceased child *ad infinitum*.

And if all the intestate's children be dead, some or all leaving issue, it is now decided that such issue take *per stirpes* and not *per capita* (*u*).

It is only the widow of the intestate who is provided for by the statute; the widow of a child or other issue of the intestate takes nothing under it (*r*).

Effect of s. 5
as to advanc-
ements by the
intestate.

The provisions of s. 5 of the Statute of Distributions, directing advancements by the intestate in his lifetime by portions to his children to be brought into account, apply to an intestacy occasioned by a testamentary instrument becoming wholly inoperative by the death of the universal legatee and executrix in the lifetime of the testator, as well as to a case of actual intestacy occasioned by the non-existence of any testamentary instrument (*y*).

It was held prior to the passing of the Executors Act, 1880 (11 Geo. IV. & 1 Will. IV. c. 40), that this section applied only to the case of a total intestacy as regards the beneficial interest, or with something more, namely, an intestacy as to the appointment of an executor, and not where part only of the personal estate by reason of the lapse of a share bequeathed

(*t*) See Williams (10th ed.) 1237 517.
et seq.

(*u*) *Re Ross's Trusts*, (1871) L. R.
13 Eq. 286; *Re Natt*, (1888) 37 C. D.

(*x*) Williams (10th ed.) 1238.

(*y*) *Re Ford*, [1902] 1 Ch. 218;
[1902] 2 Ch. 605.

became distributable (x); and, in cases where that Act has no application (a), in applying the analogy of the Statute of Distributions to the case of a partial intestacy of the beneficial interest in undisposed-of residue, the rule of equity still is that advances made by the testator in his lifetime need not be brought into hotchpot (b).

Where, however, the Executors Act, 1890, applies, it may be, the analogy of the Statute of Distributions would be applied to its full extent, and advances made by the testator would have to be brought into hotchpot (c).

This section with regard to advances applies only to advances made by a father dying intestate, and does not apply to a mother, being a widow, advancing a child and dying intestate (d).

The issue of a deceased child stand in no better position than the deceased child they represent, and if such deceased child has been advanced by his father, who afterwards dies intestate, the issue of the dead child must bring into hotchpot what their father received by way of advancement, as he, if living, must have done (e).

Issue of deceased child in no better position than their parent.

Where a father makes a provision for a child on marriage, all the limitations in such settlement to the wife or husband and children of such child must be considered as part of that advancement; and it is not the child's estate for life only that ought to be valued and brought into hotchpot. The intent of the statute was to make all equal (f).

What is an advancement.

A provision which a father may make for his child by Will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought into hotchpot. Such a provision, as shall be construed an advancement, must result from a complete act of the intestate in his lifetime, by which

(x) *Cowper v. Scott*, (1731) 3 P. Williams, 119, 125.

(a) See *ante*, p. 513.

(b) *Re Roby*, [1908] 1 Ch. 71.

(c) See *Re Ford*, *ubi sup.* at p. 232; and the remarks of Fletcher Moulton, L.J., in *Re Roby*, *ubi sup.* at p. 80.

(d) *Holt v. Frederick*, (1726) 2 P. Williams, 356.

(e) *Proud v. Turner*, (1729) 2 P. Williams, 560.

(f) *Weyland v. Weyland*, (1742) 2 Atk. 635.

he divested himself of all property in the subject; though it is not requisite that it should take effect in possession till after his death (g).

The question as to what shall constitute an advancement has been considered in an early part of this work (h).

It would seem the value of the advancement should be calculated as at the time it was made (i).

Advances carry interest at 4 per cent. from the death of the intestate (k).

Valuation of
advances.

Interest on
advances.

(2) *Of the Rights of the Wife, Father, Mother, and Next-of-kin in default of Issue of the Intestate.*

Sect. 6. If
no child or
representa-
tives of de-
ceased child.

Sect. 6 of the Statute of Distributions provides that, "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next-of-kindred of the intestate who are in equal degree, and those who legally represent them."

Sect. 7. No
representa-
tion among
collaterals
after brothers'
and sisters'
children.
If no wife.
If no child.

Sect. 7 provides "That there be no representations admitted among collaterals after brothers' and sisters' children: and in case there be no wife, then all the said estate to be distributed equally to and amongst the children; and in case there be no child, then to the next-of-kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

Next-of-kin,
how ascer-
tained.

The next-of-kin, referred to by the statute, are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration (l).

Rights of
father.

When a child dies intestate, without wife or issue, leaving a father, the latter is entitled, as the next-of-kin in the first degree, to the whole of the personal estate, exclusive of all others (m).

(g) Williams (10th ed.) 1248.

(h) See *ante*, p. 450 and see Williams (10th ed.) 1215 *et seq.*

(i) *Kircudbright v. Kircudbright*, (1802) 8 Ves. 51, 63; *Hatfield v. Minet*, (1878) 8 C. D. 136, 146; c. f. *Re Hargreaves*, (1903) 88 L. T. (N. S.) 100, and *Re Gilbert*, (1908) W. N. 63,

as to mode of adjustment between advanced and unadvanced children where a Will contains a hotchpot clause.

(k) *Re Davy*, [1908] 1 Ch. 61.

(l) Williams (10th ed.) 1248 *et seq.*, and see *ante* p. 101.

(m) *Ibid.*

If an intestate dies without issue, but leaving a widow and a father, then the personal estate shall go in moieties between the wife and father, subject to the widow's rights under the Intestates' Estates Act (n). Rights of wife and father.

Although the children of a brother or sister stand in place of the parent in sharing with other brothers and sisters and take *per stirpes*, yet if no brother or sister is alive the representation *in loco parentis* is at an end and all take *per capita* (o). As to representation to brothers and sisters.

There are no provisions in the statute as to hotchpot with reference to brothers and sisters (p).

Sect. 7 of Stat. 1 Jac. II. c. 17, enacts "that, if after the death of a father any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." Rights of mother.

Where, after the death of his father, an intestate dies leaving no child, but a widow, a mother, and brothers and sisters, and children of a deceased brother, the widow takes one moiety and the mother shares the other moiety with the intestate's brothers and sisters and the children of the deceased brother (q), and there being brothers and sisters living the children of the deceased brother take *per stirpes* by way of representation (r).

So where the intestate leaves a widow, a mother, and nephews and nieces children of a deceased brother, but no brother or sister, the widow takes one-half, the mother one-fourth, and the nephews and nieces one-fourth, but the representation is not to be carried beyond brothers' and sisters' children (s).

Brothers and sisters of the half-blood through the mother take equally with brothers and sisters of the whole blood (t). Half-blood take equally with the whole blood.

(n) Williams (10th ed.) 1249, and see *post*, p. 521.

(o) Stanley v. Stanley, (1739) 1 Atk. 455; Lloyd v. Tench, (1750) 2 Ves. Sen. 213.

(p) *Re Gist*, [1906] 1 Ch. 58; [1906] 2 Ch. 290.

(q) Keylway v. Keylway, (1726) 2 P. Williams, 344.

(r) Lloyd v. Tench, *ubi sup.* at p. 215.

(s) Stanley v. Stanley, *ubi sup.*

(t) Jemopp v. Watson, (1833) 1 M. & K. 655.

If the intestate left neither wife, nor child, nor father, and there be neither brother or sister, nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother (*u*).

Rights of grandfather and grandmother.

Brothers and sisters are preferred to a grandfather or grandmother, although they are all in the second degree of kindred, and this by reason of the law established previously to the statute (*x*).

Rights of great-grandfather and great-grandmother and uncle and aunt.

But a grandfather or grandmother, being nearer kindred, is preferred to an uncle or aunt, and a great-grandfather or great-grandmother will take equally with an uncle or aunt, all being in the third degree (*y*).

Where the intestate leaves a grandfather by the father's side and a grandmother by the mother's side, his next-of-kin, they shall take in equal moieties, as being in equal degree; for here dignity of blood is not material (*z*).

Rights of nephews and nieces.

Uncles and aunts and nephews and nieces, being of equal kindred, share equally (*a*), and as to the nephews and nieces no right of representation is allowed but must take *per capita* and not *per stirpes* (*b*).

Affinity or relationship by marriage gives no title to participate.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute. Therefore, if the intestate had a son and daughter and they both die, the former leaving a wife and the latter a husband, upon the testator's death afterwards, such husband and wife have neither of them any claim on the estate (*c*).

So also a mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions (*d*).

(*u*) Williams (10th ed.) 1251.

(*x*) Evelyn v. Evelyn, (1754) 3 Atk. 762.

(*y*) Lloyd v. Tench, (1750) 2 Ves. Sen. 215.

(*z*) Moor v. Barham, (1728) referred to in Blackborough v. Davis, (1701)

1 P. Williams, 53.

(*a*) Lloyd v. Tench, *ubi sup.*

(*b*) Durant v. Prestwood, (1738) 1 Atk. 454.

(*c*) Williams (10th ed.) 1253.

(*d*) Williams (10th ed.) 1251.

(8) *Of the Rights of Husband and Wife.*

Sect. 25 of the Statute of Frauds (29 Car. II. c. 3) provides that the Stat. 22 & 23 Car. II. c. 10 shall not be construed to extend to the estates of *feme covert*s that should die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates and recover and enjoy the same as they might have done before the making of the said Act.

Effect of 29
Car. II. c. 3,
s. 25,
as to rights
of husband.

The Intestates' Estates Act, 1890 (53 & 54 Vict. c. 20) enacts as follows:—

Effect of
Intestates'
Estates Act,
1890,
as to rights
of wife.

Sect. 1. "The real and personal estates of every man who shall die intestate after the 1st September, 1890, leaving a widow but no issue, shall, in all cases where the net value of such real and personal estates shall not exceed £500, belong to his widow absolutely and exclusively."

Sect. 2. "Where the net value of the real and personal estates, in the preceding section mentioned, shall exceed the sum of £500, the widow of such intestate shall be entitled to £500, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such £500, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment."

Sect. 3. "As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively."

Sect. 4. "The provision for the widow, intended to be made by this Act, shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of £500, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed."

Sect. 5 provides for the valuation of real estate upon a basis of 20 years' purchase, less the gross amount of charges; and s. 6 provides that the value of the personal estate shall

be ascertained by deducting from the gross value all debts, funeral and testamentary (i.e. administration (e)) expenses of the intestate and all other lawful liabilities and charges to which the personal estate shall be subject.

Act applies only where husband dies wholly intestate.
Time of valuation.

The Act only applies to the case of a man dying wholly intestate, and does not, like the Statute of Distributions, apply to cases of partial intestacy (f).

The value of the intestate's real and personal estates must be taken as at his death; so that if the intestate was at his death entitled to a contingent reversionary interest, it must be taken at its then value and not at the value when the interest subsequently fell into possession (g).

Effect on widows' dower.

The charge of £500 comes before the widow's right to dower, and consequently her right to dower out of the residue of the real estate is diminished proportionately (h).

Exclusion of wife by agreement.

A wife may by agreement exclude her title to participate under the Statute of Distributions, and such an agreement will apply equally in favour of the next-of-kin as of the legatees under the Will of her husband, that is, whether the husband die intestate or testate. But in the absence of agreement a declaration by the Will of her husband excluding her title is deemed to be merely for the benefit of the person in favour of whom the property is bequeathed, so that if the purpose fail there is no reason why the exclusion should continue (i). The testator may, however, show the intention of an absolute exclusion of his widow from any share which may accrue under any circumstances, in which case she may be put to her election and her share under the statute will enure for the benefit of the next-of-kin as a gift by implication (k).

When distributive share satisfies husband's covenant to leave property to his wife.

Where a husband covenants to leave or pay at his death a part of his estate or a sum of money to his widow, such covenant will be deemed satisfied by the distributive share to

(e) See *Re Twigg's Estate*, [1892] 1 Ch. 579, 589.

(f) *Ibid.*

(g) *Re Heath*, [1907] 2 Ch. 270.

(h) *Re Charriere*, [1896] 1 Ch. 912.

(i) *Roper on Husband and Wife* (2nd ed.), vol. 2, p. 22.

(k) *Lett v. Randall*, (1855) 3 Sm. & G. 83.

which on his intestacy she becomes entitled under the statute, either wholly if such share is more than what is covenanted to be left or paid, or *pro tanto* if less(*l*). But this principle does not apply where the contract is to be fulfilled in the husband's lifetime and there has been a breach(*m*). And where the covenant was entire to pay a definite sum to trustees who were to hold part for the widow absolutely and as to the rest to pay the interest to her for life only, it was held in *Couch v. Stratton* (*n*) that since the latter not being given absolutely could not be considered satisfied out of the distributive share neither could the former(*o*). But in *Salisbury v. Salisbury* (*p*), in the case of a covenant to pay an annuity, Wigram, V.-C., while feeling compelled to follow the decision of the Lord Chancellor in *Couch v. Stratton*, stated he could not understand why the rule which is applied in the case of a gross sum should not also be applicable to an annuity, and he treated the case as one in which performance and not satisfaction is to be shown.

CANADIAN NOTES.

Executors are chargeable with interest upon the residue from the time when it might properly have been distributed. *Boys' Home v. Lewis* (1883), 4 O.R. 18.

A residuary disposition of all the residue of an estate consisting of money, promissory notes, vehicles and implements, was held to carry land, a devise of which has lapsed, notwithstanding a gift to another of all the real and personal estate. *Re Farrell* (1906), 12 O.L.R. 580.

A direction to executors to divide a residue amongst the legatees before named and his executors, or those surviving

(*l*) *Garthshore v. Chalie*, (1804) 8 Sim. 451, 465.
 10 Ves. 1.
 (*m*) *Oliver v. Brighthouse*, (1732) (n) (1799) 4 Ves. 391.
 referred to in *Lee v. D'Aranda* 1 (o) *Ibid.*
 Ves. Sen. 1; *Lang v. Lang*, (1837) (p) (1848) 6 Hare, 526.

them, in equal shares or proportions, gives the executors one share only, they being treated as a class. *Boys' Home v. Lewis*, 4 O.R. 18.

An executrix, who was the widow of the testator, and entitled to the use of the testator's property during her life, which was given in remainder to his children, took possession of and carried on the business of brickmaking upon land leased to the testator. She renewed the lease, which expired shortly after his death and leased other land for the same purpose and largely extended the business, putting in other assets of the estate, and large profits were made. On her death it was held that the business was carried on for the benefit of the estate; that she was entitled to the profits for her own use during her life, but whatever part of the profits she put back into the business became the property of the estate, and ultimately divisible amongst the remaindermen. *Wakefield v. Wakefield*, 32 O.R. 36.

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shews that the testator intended they should take the residue beneficially. *Thorpe v. Skillington*, 15 Gr. 85.

Where land is devised for life, a residuary devise of all the real estate passes the reversion in the same land. *Swart v. Gregory* (1856), 15 U.C.R. 335. And where an annuity is given for life a residuary bequest carries the capital. *Re Watt* (1896), 29 N.S.R. 100.

Legacies directed to be paid out of a mixed residue are a charge on land. *Young v. Purvis* (1886), 11 O.R. 597. See *Moore v. Mellish*, 3 O.R. 174; *In re Gilchrist, Bohn v. Fyfe*, 23 Gr. 524.

A testator by his will after directing payment of his debts by his executors, gave his personal estate and the dwelling house with the land occupied therewith, to his wife for life, and after her decease to his daughter M., and gave M. a legacy of \$2,000. He then devised the residue of his real estate to his executors in trust, to lease and pay the interest to his wife for life, and after her death, to sell same and

divide proceeds between his children, share and share alike. At the time of testator's death, the personal estate was of small value, and was exceeded by the amount of the debts, and it did not appear whether, when the will was made, the testator had sufficient personal estate out of which the legacy could be paid. It was held that M. could not claim to have the \$2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no reduction from her share by reason of the real estate devised to her. *Totten v. Totten* (1890), 20 O.R. 505.

Lapsed devises or devises contrary to law become part of the residuary devise, under legislation in various provinces of Canada. R.S.O., c. 128, s. 27; R.S.N.S., c. 139, s. 25; R.S.B.C., c. 193, s. 22; R.S.M., c. 174, s. 23; R.S.N.B., c. 160; s. 19. See *Re Smith* (1904), 7 O.L.R. 619. R.S.O. 1897, c. 128, s. 27.

Lapsed
devises
become
part
of residue.

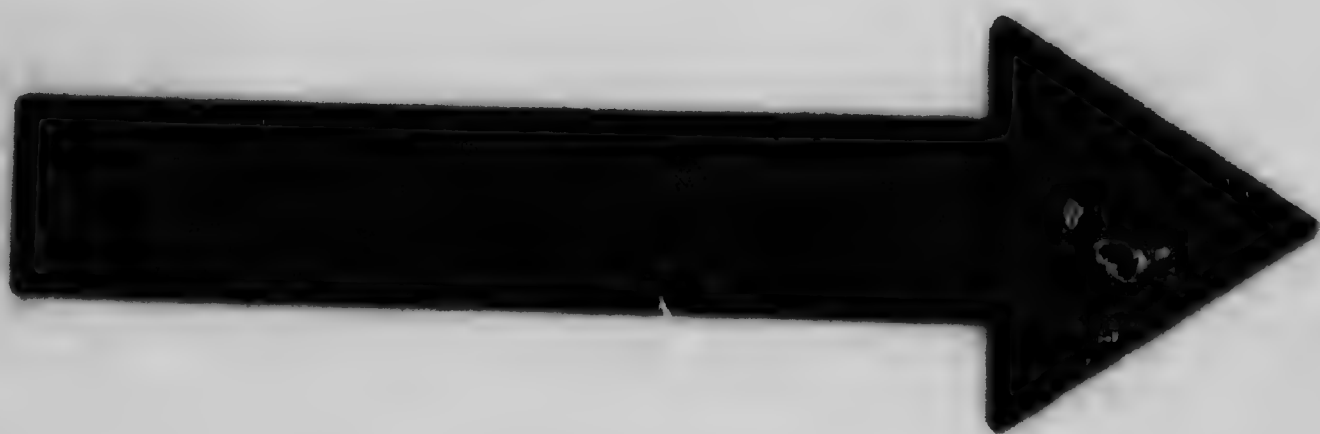
A devise of "the residue of my estate" will pass the residue of the lands though misdescribed in detail. *Doyle v. Nagle* (1887), 24 A.R. 162.

A direction to executors or a majority of them to sell and convey, with a residuary devise to one of them who proves the will, gives that one a power coupled with an interest, and enables him to convey alone. *Wessels v. Carscallen*, 10 C.P. 215.

Where there is a devise on trust for sale and to apply the proceeds for purposes some of which fail, with a disposition of the residue of the proceeds of sale, and a gift of the general residue of the estate, the gifts which fail go to augment the particular residue of the devise and not the general residue of the estate. *McMylor v. Lynch*, 24 O.R. 632.

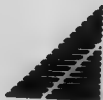
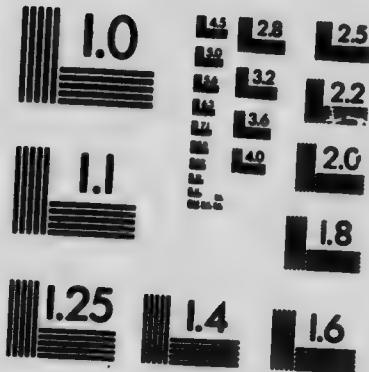
Section 12 of the Devolution of Estates Act, R.S.O. 1897, c. 127, as to the widow's statutory claim for \$1,000, does not apply where there is a partial intestacy, as in this case, where a testator failed to dispose of his residuary estate. *Re Harrison*, 2 O.L.R. 217.

Where a residuary bequest directs the residue to be "divided *pro rata* amongst the legatees," previously named in



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the will, they share the residue in proportion to the respective amounts of their prior legacies. *Kennedy v. Protestant Orphans' Home* (1894), 25 O.R. 235. See also *Ray v. Annual Conference of New Brunswick* (1881), 6 S.C.R. 308. An annuitant is a legatee and entitled to share in such a distribution. *Woodside v. Logan* (1868) 15 Gr. 145. For an instance, however, where the word "legatees" was given a more restricted meaning because of the special wording of the direction. See *Edward v. Smith* (1877), 25 Gr. 159.

Where a residue was directed to be divided amongst the "different parties mentioned in my will," it was held to mean parties mentioned, as beneficiaries, and to exclude those mentioned in the codicil. Parties mentioned as living at a certain date would not include corporations. *Re Miles* (1907), 14 O.L.R. 241. See also *Re Meudell* (1908), 11 O.W.R. 1093.

As to the time for payment of the residue. See *Macklem v. Daniel* (1889), 18 O.R. 434.

A testator prefacing that he could not give his grandchildren more than one-sixth of the residue, devised and bequeathed such one-sixth, and then directed that certain lands "form part of the share of my said grandchildren in this partition" and directed sale thereof and investment of the proceeds. Held, that the lands so mentioned formed part of the residue, and were not devised in addition to the one-sixth. *Hazen v. Hazen* (1880), 20 N.B.R. 70.

Undisposed
of residue.

Where a testator began his will by declaring his intention to dispose of his whole estate and then gave two legacies which did not exhaust it, it was held that the residue was undisposed of. *McLennan v. Wishart* (1868), 14 Gr. 512.

A direction that in the event of my "estate being insufficient to pay certain pecuniary legacies they shall abate proportionately, does not charge them on the residue. *Re Fairley* (1895), 1 N.B. Eq. 91.

Void bequests, part of a residue, do not accrue to the other legatees who have specific portions of the residue, but

pass to those entitled on intestacy. *Purcell v. Bergin* (1893), 20 A.R. 535.

Where the husband of one of several residuary legatees was a witness to the will made in a province where a bequest to the husband of a witness was void the will was read as if the gift to the witness did not appear in the will, and the residue was distributed amongst the other residuary legatees. *Farewell v. Farewell* (1892), 22 O.R. 573.

Where there is an attempt to dispose of certain property which fails, and there is no residuary devise, there is an intestacy, and the undisposed of property will be dealt with as belonging to the estate of the testator and as though not mentioned in the will. *Re Archer* (1907), 14 O.L.R. 374. Intestacy.

The presence of a subsequent general residuary clause in a will does not suffice to justify the Court in cutting down a previous disposition contained in the will which is clearly residuary in character, and which, upon any view of the whole will, is necessarily so comprehensive that it completely disposes of the entire estate, or of all the property of any one kind. *Re Coy* (1907), 10 O.W.R. 884. Indeed, a general residuary clause in such a will may, if necessary, be deemed to have been added merely "for the sake of greater caution, or as a usual form." *Re Pink*, 4 O.L.R. 718. But if there is a later general residuary clause, and the earlier clause, though framed in language sufficiently broad to render it a general residuary disposition, can, upon any admissible construction be read as relating to particular property, it may be so construed. *Re Coy, supra*. General residuary clause.

A testatrix, having a general power to appoint by will or otherwise, devised her estate to executors "in trust to convert the same into cash" and pay certain legacies, and gave the residue for an object which failed for indefiniteness, and it was held that this was an exercise of the power for all purposes, and that the residue which failed was held by the executors on trust for the next of kin. *Re Wilson* (1899), 30 O.R. 553.

When a testator charged his debts, funeral and testamentary expenses and legacies upon debts due to him, the deficiency, if any, to be made up out of his land which he specifically devised, and gave his household furniture and other personal chattels, except his piano, to his wife, and there was no other residuary clause in his will, the whole of the residuary estate except the debts and piano were held to pass to the wife exonerated from the payment of debts. *Scott v. Scott* (1871), 18 Gr. 66.

Admission of Assets.

Payment of a legacy in full is a *prima facie* admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion, but it is open to explanation. *Coleman v. Whitehead* (1852), 3 Gr. 227.

Payment by the executor of some legacies and making provision for the others is not a conclusive admission of assets, because the provision which was made for the unpaid legacies, may have proved insufficient without his fault. *Coleman v. Whitehead*, *supra*.

Assent
implied.

The assent of an executor to a legacy may be by implication as well as by express words, *e.g.*, from his conduct. *Honsberger v. Honsberger* (1877), 5 O.S. 479; *Teahon v. Leamy* (1861), 21 U.C.Q.B. 216.

Where executors were directed that, after payment of debts, etc., and providing for annuities, they should "with all convenient speed divide the residue amongst certain persons," it was held that their legacies vested at the time when the distribution was to have been made, and that the executors could not postpone it, and therefore that the share of one of the residuary legatees who died after a partial dis-

tribution passed to his representatives. *Jarvis v. Crawford*, 21 Gr. 1.

Where A. died intestate leaving as heirs a sister and two nephews and upon passing accounts of his estate a sum of \$1,000 was found to be in the hands of his administrators and was directed to be left there until the final winding up of the estate, it was held that the payment of that amount or any part of it to defend a suit to set aside a trust deed of the sister after her death could not be allowed. *Re Anning* (1897), 34 N.B.R. 308.

As an instance of a special construction given the word "residue," see *In re Mackinlay* (1905), 38 N.S.R. 254.

CHAPTER XL.

OF REFUNDING OF LEGACIES (a).

General proposition, executor cannot retract his assent.

Presumption that executor paying a legacy has sufficient to pay all.

Exceptions. Payment under compulsion of suit. Payment without notice of debts.

ALTHOUGH it is true, as a general proposition, that if an executor once assents to a legacy he can never afterwards retract(b), yet under certain circumstances legatees are bound to refund their legacies or a rateable part(c).

Whenever an executor pays a legacy the presumption is he has sufficient to pay all legacies; and the Court will oblige him, if solvent, to pay the rest, and not permit him to bring an action to compel the legatee, whom he voluntarily paid, to refund(d).

But where the payment of the legacy by the executor is under the compulsion of a suit, he is entitled to compel the legatee to refund in case of a deficiency of assets (e).

If an executor pays away the residue to the residuary legatee without knowledge of anything that interferes with the right to receive it, and debts are subsequently discovered which he is liable to pay, he can call on the residuary legatee to refund(f).

If an executor pays the money to the residuary legatee with knowledge of a debt, and he is afterwards obliged to pay the debt, he cannot call on the residuary legatee to refund(g).

Notice of a mere liability is not enough; there must be notice of a debt. Considering how many persons are liable on shares in public companies and on leases, it would produce enormous difficulty in the administration of estates to lay down that an executor must keep assets in hand until every liability of the estate has been satisfied(h).

(a) See *ante*, p. 351, as to creditors following assets.

(b) Williams (10th ed.) 1108; and see *Doe v. Guy*, (1802) 3 East, 120, 123.

(c) Williams (10th ed.) 1188.

(d) *Orr v. Kaines*, (1750) 2 Ves.

Sen. 194.

(e) Williams (10th ed.) 1188.

(f) *Whittaker v. Kershaw*, (1890) 45 C. D. 320, 325.

(g) *Ibid.*

(h) *Ibid.*, at p. 326.

An executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee without any intermediate income (i).

Capital only without intermediate income recoverable. In administration proceedings Court will compel restitution as between beneficiaries.

Where trustees, under an erroneous view of a Will, pay to parties money to which they are not entitled, the Court, in administering the estate, will compel a restitution and repayment, and will give a lien on the other interests of such parties under the Will, even as against an assignee for valuable consideration (k).

So where a beneficiary has been paid less income than he is entitled to he may claim to have the payments equalized out of future income; but where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died, it was held that his executors could not recover from the other beneficiaries the amounts so overpaid, or claim to have accrued or future income impounded till the shares were equalized, as he was the person responsible for the mistake (l).

It would seem that in no case where the executor is solvent can an unsatisfied legatee maintain a suit against another who has been satisfied; because the remedy is in the first place against the executor, who, by paying the one legacy, has admitted assets to pay all (m). But it is not correct to say that you cannot recover from a person who has received a trust fund the money improperly paid him except through the instrumentality of the trustee. Moreover, the Statute of Limitations does not apply to such a case, and the person who has obtained possession of a trust fund has been compelled to repay it at any distance of time, if there have been no improper laches on the part of the person seeking to recover it (n). But if the remedy against an executor or administrator is statute barred the corresponding claim to refund is also lost.

(i) *Jervis v. Wolferstan*, (1874) L. R. 18 Eq. 18.

(k) *Dibbs v. Goren*, (1849) 11 Beav. 483.

(l) *Re Horne*, [1905] 1 Ch. 76.

(m) *Williams* (10th ed.) 1191.

(n) *Harris v. Harris*, No. 2, (1861) 29 Beav. 110.

If fund appropriated fails, others interested under Will not liable to contribute to make good loss.

If an executor makes payments to a trustee for a legatee, or makes such an appropriation as is equivalent to payment, the other persons entitled under the Will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated (o).

If there be no payment, and no appropriation equivalent to payment, there is no reason why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees. Accordingly, where the surviving executor and trustee had invested, in his own name, in the purchase of consols, the amount of an infant's legacy, minus the legacy duty, but without any declaration of trust, and afterwards misappropriated the consols, it was held not to be an appropriation, and consequently that further assets unexpectedly falling in ought in the first place to be applied in making good the infant's legacy (p).

The residuary legatee can take nothing till all the pecuniary legatees have been paid, unless they consent (q).

Effect of executor wasting the estate while some legacies remain unsatisfied.

If the assets be originally sufficient to satisfy all the legacies, and one of the legatees procures from the executor, either by means of or without a suit, payment of his legacy, and afterwards the executor wastes the estate so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund, first, because the payment was not a *devastavit* by the executor, and, secondly, because the legatee is protected by the principle that *vigilantibus, non dormientibus, jura subveniunt* (r). Still less could they have any such right when the loss has arisen from accidental misfortune without any fault of the executor (s).

Same rule in the case of payment of one of several residuary legatees or next-of-kin.

So also where one of several residuary legatees or next-of-kin has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the

(o) *Willmott v. Jenkins*, (1838) 1 Beav. 401.

(p) *Ibid.*

(q) *Baker v. Farmer*, (1868) L. R. 3 Ch. 537.

(r) *Roper on Legacies*, p. 459, approved by *Turner, L.J.*, in *Fenwick v. Clarke*, (1862) 4 De G. F. & J. 240.

(s) *Fenwick v. Clarke*, *ubi sup.*

estate is subsequently wasted; but it is otherwise if the wasting has taken place before such share was received (f).

Where an undischarged bankrupt died leaving property acquired after the bankruptcy, and his administrator without notice of the bankruptcy distributed the property among the bankrupt's next-of-kin before the trustee in bankruptcy intervened, it was held that the administrator was protected by the administration bond, but that the next-of-kin must refund the share they had respectively received (u).

Distribution without notice that intestate had been bankrupt.

CANADIAN NOTES.

Defendant was appointed executor under a will which, after he had obtained probate and had collected debts, paid legacies, etc., was set aside for want of due execution. It was held that the granting of probate was a sufficient defence to an action brought by the administrators to recover the moneys paid. Also, that plaintiff's case was not strengthened by the fact that defendant, before paying the legacies had notice that the will would be attacked on another ground than that upon which it had been set aside. *Randall v. Delap*, 18 N.S.R. 106.

Will set aside after executors paid legacies.

In Ontario (Ontario Acts 1890, c. 29) executors are protected by legislation.

An alleged will of the testatrix, containing a provision for payment of \$1,000 to the Archbishop of Halifax, to be applied towards the education of any deserving boy for the Roman Catholic priesthood, was set aside for defective proof after the sum had been paid to the Archbishop. (See 35 S.C.R. 510.) An existing, earlier will was then probated, which will contained a provision for payment of the same amount towards the education of any of the testatrix's grand-

(f) *Peterson v. Peterson*, (1866) L. R. 3 Eq. 111; *Re Winslow*, [1890] 45 C. D. 249; *Re Lapine*,

[1892] 1 Ch. 210.

(u) *Re Bennett*, [1907] 1 K. B. 149.

children for the priesthood. The grandchildren, in an administration action, were held entitled to have the \$1,000 paid according to the terms of the valid will, the executrix being left to her remedy of recovering the sum from the Archbishop, if such remedy existed. *Cullen v. McNeil* (1907), 4 E.L.R. 133. Affirmed on appeal to the Full Court. Will be reported, 42 N.S.R.

By R.S.O., c. 129, s. 34, all creditors are placed on an equal footing, and an executor cannot prefer one to another, therefore, where a creditor was paid in full, and a deficiency of assets occurred, the executors being insolvent, the Court ordered the creditor who had been paid in full to refund the excess over his proportionate share, at the instance of other creditors. *Chamberlen v. Clark* (1882), 1 O.R. 135; 9 A.R. 273.

Manitoba and Alberta enactments also place all creditors on an equal footing. R.S.M., c. 170, s. 39.

New Brunswick has a similar enactment applicable to all creditors except the Crown. R.S.N.B., c. 118, s. 44.

Where an executor by mistake made overpayments of interest on a legacy, it was held that he was entitled to a refund of the excessive payments without interest. *Barber v. Clark* (1891), 20 O.R. 522, 18 A.R. 435.

Compelling
refund.

But where a residue was distributed under an administration by the Court, in the absence of legatees entitled thereto, who could not be found, the recipients were ordered to refund with interest from the date of the proceedings taken to compel the refund. *Uffner v. Lewis, Boys' Home v. Lewis* (1903), 5 O.L.R. 684.

The plaintiff, as executor of one W. having paid money to defendant as a legatee under the will, and the will, with the probate thereof having been afterwards set aside, by a decree of the Court of Chancery, the plaintiff was held entitled to recover back the money. *Haldan v. Beatty* (1876), 40 U.C.Q.B. 110.

Sums paid to legatees with the sanction of the Court but in a suit in which infants, now claiming, were not properly

represented were afterwards discovered to have been over-
paid. Held, that the parties to whom payments had been Over-
made must refund, but that under the circumstances the payments.
order for payment should provide so that the mode thereof
would be as little burdensome as should appear to be consis-
tent with justice to the parties entitled to receive the money.
Anderson v. Ball (1883), 8 A.R. 531. And see *Uffner v.*
Lewis (1903), 5 O.L.R. 684.

CHAPTER XLI.

OF ASSIGNMENT OF LEGACIES AND RESIDUARY PERSONALTY.

SECT. 1.—*By Act of Parties.*

Assignability
of equitable
choses in
action.

Assignee
takes subject
to prior
equities.

Effect of
notice:
on priority;

LEGACIES and residuary personalty are equitable choses in action, and even before the year 1875, when debts and other legal choses in action were by the Judicature Act, 1873 (a) made assignable at law, legacies and residuary personalty were assignable in equity, and the assignee could sue in his own name in equity to recover them without joining the assignor as a party to the proceedings (b). The equitable assignee, however, took subject to all prior equities, and under the Judicature Act the assignment is to be deemed effectual subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed.

The rule established by *Dearle v. Hall* (c) is, in the words of Lord Macnaghten in *Ward v. Duncombe* (d), "That an assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee" (e).

The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land (f).

The priority of equitable assignees or incumbrancers will be according to the dates of the notices given by them to the executor or administrator.

(a) 36 & 37 Vict. c. 66, s. 25 (6).

(b) See White & Tudor's L. Cas. notes to *Ryall v. Rowles*, (1749) 1 Ves. Sen. 348.

(c) (1823) 3 Russ. 1.

(d) [1893] A. C. 384.

(e) Per Stirling, L.J., in *Re Dallas*, [1904] 2 Ch. 385, 415.

(f) *Wigram v. Buckley*, [1894] 3 Ch. 483.

Though trustee for the persons entitled to the fund, whether he knows their names or not, that is to say before notice, the notice places the executor or administrator under a direct responsibility to the person who gives the notice, and if he disregards the notice he does so at his peril. Though in the absence of notice he would be safe in paying away the fund to those who appear by the instrument constituting the trust, or by title properly deduced from them, to be the true owners (g).

on relative position of personal representative.

Notice to an executor who afterwards renounces without having in any way acted in the office is invalid (h).

Notice given by an assignee of a fund to the person who is himself the assignor is not an effectual notice so as to alter priorities (i).

The rule in *Dearle v. Hall* applies equally although there is no trust fund and no trustee in existence at the date of the several assignments, as in the case of an assignment of a mere expectancy such as a legacy under the Will of a living person: the assignee who first gives notice to the legal personal representative on the death of the testator has priority (k).

Effect of there being no trustee at date of assignment.

Where there are several trustees, and, at the time the second incumbrance is made, one of the trustees has notice of a prior incumbrance, notice of the second incumbrance will not give it priority over the earlier assignment, since the party giving notice had taken the property out of the apparent ownership and possession of the *cestui que trust*; and the priority of the prior incumbrance is not affected by the trustee to whom he has given notice dying or ceasing to act after the time of the second incumbrance and notice to the trustees. Where, however, notice is given to one trustee only, who is no longer a trustee at the time the second incumbrancer advances his money, the fund is again in the apparent possession of the *cestui que trust*, and in those circumstances the title of the second incumbrancer or assignee who had

Where there are several trustees: notice to one only;

effect of his death after second assignment;

effect of his death before second assignment.

(g) See per Ld. Macnaghten in *Ward v. Duncombe*, [1893] A. C. 384, 392.

(h) *Re Dallas*, *ubi sup.*

E.

(i) *Browne v. Savage*, (1859) 4 Drew. 635.

(k) *Re Dallas*, *ubi sup.*

given notice must prevail over that of the assignee or incumbrancer earlier in date (*l*).

Distinction
in case of
several
executors.

But in the case of several executors it is advisable to give notice to all of them, since each has separate authority to receive and pay on account of the estate, and, if he has no notice of an assignment, he may make payment to the assignor without incurring any liability on that account (*m*).

Priority
determined
by law of
England.

Where the fund is an English trust fund the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the Court which is administering the fund, and accordingly although the validity of an assignment has to be determined by the law of the place where it was executed, yet the priority of assignees will be determined by the law of England, notwithstanding the doctrine of notice is not recognised by the law of the place where the assignment was executed (*n*).

Debtor to
estate cannot
claim benefit
without con-
tributing debt.

A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it (*o*). This principle applies to debts owing to the deceased which at the time of his death were barred by the Statute of Limitations (*p*), also to loss occasioned after his death by reason of a breach of trust by a trustee legatee, and to costs or expenses incurred in an administration of the estate which a legatee is liable to make good (*q*).

Assignee or
mortgagee of
beneficiary in
no better
position.

Persons who claim by mortgages or absolute assignments from legatees are not in any better position, even though the breach of trust or the costs or expenses arise subsequently to the assignment (*r*). Every person who takes an assignment, whether by mortgage or otherwise, of a share in the hands of

(*l*) See per *Ld. Herschell, L.C.*, in *Ward v. Duncombe*, *ubi sup.*, at pp. 381, 382.

(*m*) *Timson v. Ramsbottom*, (1837) 2 Keen, 35, 53, commented on in *Ward v. Duncombe*, *ubi sup.*

(*n*) *Kelly v. Selwyn*, [1905] 2 Ch. 117.

(*o*) *Re Akerman*, [1891] 3 Ch. 212, 219, per *Kekewich, J.*

(*p*) *Ibid.*

(*q*) *Re Knapman*, (1881) 18 C. D. 300.

(*r*) *Morris v. Livie*, (1842) 1 Y. & C. Ch. 380; *Re Knapman*, *ubi sup.*

a legal personal representative, must take subject to the settlement of accounts as between the assignor and the legal personal representative; and it matters not whether those accounts are accounts in the administration of the estate, or accounts between the assignor and the legal personal representative (s).

Questions frequently arise on the distribution of estates as to the effect of covenants in marriage settlements to bring into settlement after-acquired property of the wife where the wife has survived her husband. In construing such covenants the first thing to do is to consider who are the covenanting parties. If the husband only is the covenanting party there is a strong *prima facie* reason for saying that the sole object of the covenant was to exclude the right which the husband would have taken in his wife's property, and not to bind her interest in favour of the persons entitled under the settlement. On the other hand, where the wife and husband both joined in the covenant there is a strong *prima facie* reason for saying that the object of the parties was not only to exclude the husband's marital right, but to make a provision out of the wife's property for her issue or the other persons entitled under the trusts of the settlement. Another consideration is, who is to join in and take part in the settlement, because, even if the wife is a party to the covenant, yet if the covenant is only that the husband shall do something, and not that the wife shall concur in doing it, an inference arises similar to that which arises where the husband alone is the covenantor (t).

Effect of covenants in marriage settlements to settle after-acquired property.

By the Married Women's Property Act, 1907 (7 Edw. VII. c. 18), s. 2, a settlement or agreement for a settlement made after the 1st January, 1908, by the husband or intended husband respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age; but if she died an infant the husband's covenant shall bind

(s) *Re Jones*, [1897] 2 Ch. 190, 203.

(t) See *Lloyd v. Pritchard*, [1908] 1 Ch. 265, 273, per Parker, J., and

cases referred to. See also *Tremayne v. Rashleigh*, [1908] 1 Ch. 681.

him. Moreover the Act does not affect the provisions of the Infants' Settlements Act, 1855.

Custody of documents of title of assignee.

On the distribution of a trust fund the trustee has no right to require the delivery to him of the assignment and other documents of title before payment of the share to the assignee; and where money is paid to a person who receives it under a power of attorney, the trustee cannot claim that the power of attorney should be given up to him (u).

SECT. 2.—*By Act of Law.*

(1) *Marriage.*

The title of the husband, as well in cases where the marriage took place prior to the Married Women's Property Act, 1882, as in cases of marriage subsequently to that Act, has already been considered (x).

(2) *Bankruptcy.*

Relation back to act of bankruptcy.

By s. 43 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy on which a receiving order is made against him, or in the case of more acts of bankruptcy than one to the time of the first of the acts committed within three months next preceding the date of the presentation of the bankruptcy petition.

Property which vests in the trustee in bankruptcy.

By s. 44 the property which under s. 54 vests in the trustee on his appointment includes all such property (y) as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge. A contingent interest passes to the trustee in bankruptcy, but not the mere possibility of an interest, as for instance what a bankrupt may subsequently become entitled to under the exercise of a power of appointment (z).

(u) *Re Palmer*, [1907] 1 Ch. 486.

(x) See *ante*, p. 289.

(y) See s. 168 for definition of word "property."

(z) *Re Vizard's Trusts*, (1866) L. R. 1 Ch. 588, and see *Williams' Bankruptcy Practice*, 8th ed. p. 202.

A bankrupt who acquires property after his bankruptcy acquires it as agent for the trustee, and is entitled to deal with it as such agent, unless and until the trustee as principal intervenes (a).

Power of disposition of bankrupt until trustee intervenes.

Until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee (b). This doctrine applies to a legacy and a share of residue under a Will even where the trustee intervenes before the bequeathed property has reached the hands of a *bonâ fide* equitable assignee (c). It also applies to leaseholds (d), but it does not apply to real estate (e); although where there is an agreement for an advance and a charge contemporaneous with and to enable the purchase of real estate, and the lender has no notice of the bankruptcy, the charge will be supported against the trustee (f).

A trustee in bankruptcy is in no better position than an assignee for value, and it is incumbent on him to perfect his title by giving notice, or obtaining a stop order which is equivalent to notice, and if he fails to do this he will be postponed to a subsequent mortgagee or assignee who has given notice or has obtained a stop order (g). If the particular assignee from the undischarged bankrupt has not perfected his title by notice to the holder of the fund or by a stop order, the trustee in bankruptcy as general assignee can by intervening and claiming the fund from the bankrupt, and giving notice to the holder of the fund, or by stop order, if the fund is in Court, perfect his title first to the exclusion of the particular assignee (h).

Trustee in bankruptcy in similar position as assignee for value as to giving notice.

(a) *Herbert v. Sayer*, (1844) 5 Q. B. 165.

(b) *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262, 267.

(c) *Hunt v. Frupp*, [1898] 1 Ch. 675.

(d) *Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212.

(e) *Re New Land Development Association and Gray*, [1892] 2 Ch. 138.

(f) *Bird v. Philpott*, [1900] 1 Ch. 822.

(g) *Stuart v. Cockerell*, (1869) L. R. 8 Eq. 607; *Re Russell's Policy Trusts*, (1872) L. R. 15 Eq. 26; *Palmer v. Locke*, (1881) 18 C. D. 381.

(h) *Mercer v. Vans Colina*, (1897) 67 L. J. Q. B. 424; *Re Beall*, [1899] 1 Q. B. 688.

Title of trustee in bankruptcy subject to equities subsisting at commencement of bankruptcy.

Although the general rule is that, as between several assignees or incumbrancers of a chose in action, the assignee or incumbrancer who first gives notice obtains priority, yet a trustee in bankruptcy is not an assignee for value but a statutory assignee, and a chose in action vests in him subject to all equities existing therein at the date of the commencement of the bankruptcy, and he cannot obtain priority over a good equitable mortgagee thereof for value, made prior to the bankruptcy, merely by giving notice before the mortgagee (i).

Effect of a second bankruptcy.

An undischarged bankrupt has power to dispose of any part of his assets that may remain after payment of his liabilities before the surplus is ascertained; and if an undischarged bankrupt is made bankrupt a second time the trustee in the second bankruptcy only takes that part of the surplus which has not been effectually dealt with by the bankrupt before the date of the second bankruptcy (k).

As between two trustees in successive bankruptcies the second trustee does not acquire a title as against the first trustee (l).

Effect of close of bankruptcy.

By s. 160 of the Act of 1868, on the close of a bankruptcy, property which vested in the trustee and is not realized or distributed vests in such person as may be appointed by the Board of Trade for that purpose.

(3) Conviction for Felony.

Vesting of property in administrator appointed under 33 & 34 Vict. c. 23.

Under 33 & 34 Vict. c. 23, the Crown may appoint administrators of any convict's property, and upon the appointment of any such administrator all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards while subject to the operation of the Act, become or be entitled, vests in such administrator. If no such administrator shall have been appointed, an interim curator of the property of any convict

(i) *Re Wallis*, [1902] 1 K. B. 719; and see *post*, p. 599.

(l) *Ex parte Ford*, (1876) 1 C. D. 521; *Re Clark*, [1894] 2 Q. B. 393.

k) *Bird v. Philpott*, *ubi sup.*

may be appointed by justices, provided that no property acquired by a convict during the time while he shall be lawfully at large under any licence, shall vest in any administrator so appointed; but the convict shall be entitled thereto without any interference on the part of any administrator or interim curator appointed under the Act.

(4) *Equitable Execution.*

The appointment of a receiver by way of equitable execution does not create an equitable interest in the nature of a charge; it is simply an uncompleted process to obtain payment of money (*m*).

Equitable execution does not create a charge.

A receivership order obtained by a judgment creditor by way of equitable execution over a judgment debtor's share of a testator's residuary personal estate, partly in Court in an administration action, and partly in the hands of the executor who has direct notice of the order, though not creating a charge, prevents the judgment debtor from receiving the share, or from dealing with it to the prejudice of the judgment creditor; and if, at the date of the receivership order, the residue is unascertained and the fund then in Court is insufficient for the testator's debts, so that the judgment debtor's share cannot then be taken in execution or made available by any other legal process, it prevents any subsequent mortgagee or judgment creditor from gaining priority by means of a stop order or charging order (*n*).

Prevents judgment debtor receiving or dealing with fund to the prejudice of judgment creditor.

(5) *Garnishee Order.*

A garnishee order under Ord. 45 of R. S. C. can only be obtained where there is a debt either legal or equitable which may be attached. Moneys which may or may not become payable from a trustee to his *cestui que trust* are not debts. A trustee is not an equitable debtor to the *cestui que trust* until there is money in his hands which he ought to pay to his *cestui que trust*, or until he has made himself personally liable

When money in hands of trustee may be attached.

(*m*) *Re Potts*, [1893] 1 Q. B. 648.

(*n*) *Re Marquis of Anglesey*, [1903] 2 Ch. 727.

Effect of
garnishee
order.

to pay money to his *cestui que trust* by reason of some breach of trust or default in the performance of his duties as trustee (o).

The effect of a garnishee order is to give the garnishor a lien on the debt, but it can only bind so much of the debt as the judgment debtor can honestly deal with when the order is obtained and served, and does not affect the claims of creditors in whose favour he has charged the debt, though they have not given notice of their claims (p).

(6) *Charging Orders under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82.*

Against what
property
charging
orders can
be made.

Charging orders under the Judgments Acts, 1838 and 1840 (1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1), may be made against the interest of any judgment debtor in any government stock, funds, or annuities, or any stock or shares in any public company, whether such interest is in possession, remainder or reversion, and whether vested or contingent.

Where stock is vested in personal representatives or trustees, and there is no imperative trust for sale, so that the judgment debtor may acquire an absolute title to a portion of the stock in specie, so long as the stock remains unsold the judgment debtor has an interest in it, and an order may be made charging the interest of the judgment debtor, whatever it may be, in the stock (q).

The same rule must be applied to charging orders obtained under the statutes 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, as to garnishee orders. They are both processes of execution to enforce payment of money under a judgment or order, and the execution creditor can only obtain what the judgment debtor can honestly give him (r).

(7) *Solicitor's Lien.*

Solicitor's
lien :
at common
law ;

At common law a solicitor has a lien on a fund recovered in an action for his costs in a suit, which gives him an interest

(o) *Webb v. Stenton*, (1883) 11 Q. B. D. 518.

(p) *Re Marquis of Anglesey*, *ubi sup.*, at p. 732.

(q) *Bolland v. Young*, [1904] 2 K. B. 824.

(r) *Re Marquis of Anglesey*, *ubi sup.*; and see *post*, p. 599.

in the fund itself, and has priority of payment out of the fund (s). This lien is, however, confined to the costs of the suit, and to his client's interest in the fund, and not so as to affect the rights of other persons (t), and it does not extend to real estate (u). It will not be barred by the Statute of Limitations (x).

The Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, extends under the Solicitors Act, to all property recovered or preserved, and enables the Court to declare the solicitor entitled to a charge upon the property for the taxed costs, charges, or expenses of or in reference to the suit, matter or proceedings, and to make orders for taxation and raising and payment of the same; and provides that all conveyances and acts done to defeat, or which shall operate to defeat, such charge shall, unless made to a *bonâ fide* purchaser for value without notice, be void as against such charge, but no order shall be made where the right to recover payment is barred by any Statute of Limitations.

If the solicitor is discharged before the trial of the action a charging order in his favour on a fund recovered will be subject to the lien for costs of the client's solicitor for the time being, since the solicitor acting for the plaintiff at the time the property was recovered, and the order made for payment, would have, independently of the Act, a lien on the fund, and no charging order can be made interfering with that lien (y). Effect of discharge of solicitor before trial.

(s) *Turwin v. Gibson*, (1749) 3 Atk. 581, 601.

720; *Lloyd v. Mason*, (1844) 4 Hare, 132.

(t) *Stephens v. Weston*, (1824) 3 B. & Cr. 535.

(u) *Shaw v. Neale*, (1858) 6 H. L. C.

(x) *Higgins v. Scott*, (1831) 2 B. & Ad. 413.

(y) *Re Wadsworth*, (1885) 29 C. D. 517, 520.

CHAPTER XLII.

OF LEGACIES TO INFANTS.

Payment cannot be made to a legatee under 21 years of age.

Legacy may be paid into Court.

Doubtful whether legacy can be paid to guardian of infant.

Application of income for infant's benefit. Effect of s. 43 of 44 & 45 Vict. c. 41.

WHERE a legatee to whom a legacy is given direct, without the intervention of a trustee, is an infant, payment cannot be made to him until he attains the age of twenty-one years (*a*).

The executor may, however, relieve himself from all responsibility by paying the amount of the legacy into Court under s. 42 of the Trustee Act, 1893 (56 & 57 Vict. c. 58) (*b*), and it would seem that this is the proper course to pursue in order to free the residue and stop payment of 4 per cent. interest (*c*).

Whether a testamentary guardian appointed under 12 Car. II. c. 24 can give a discharge for a legacy payable to an infant is open to question, and it would be unwise for the executor to incur the risk (*d*).

Sect. 43 of the Conveyancing and Law of Property Act, 1881 (*e*), provides that (1) "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

(*a*) See Williams (10th ed.) 1137.

(*b*) Sect. 42 of the Trustee Act, 1893, is substituted for s. 32 of the Legacy Duty Act, 1796, which is repealed by the Act of 1893.

(*c*) *Re Salaman*, [1907] 2 Ch. 46.

(*d*) *M'Creight v. M'Creight*, (1849) 13 Ir. Eq. R. 314, and *Re Cresswell*, (1881) 45 L. T. 468.

(*e*) 44 & 45 Vict. c. 41.

"(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

"(3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

In *Re Smith* (f) it was held that when the estate is cleared, and the residue ascertained which belongs to an infant, the executor is a trustee of the residue for the infant within the meaning of s. 48 of the Act of 1881, and is entitled to apply the income for the infant's maintenance, education, or benefit, as provided by that section, and that it makes no difference for this purpose whether a pecuniary legacy payable out of the estate is given to an infant or the residue of the testator's estate is given to an infant, as soon as that residue is ascertained. As soon as the legacy is assented to or the residue is ascertained it assumes the character of a trust fund. In *Re Adams* (g), Kekewich, J., in holding that the same principle applied to an administrator with the Will annexed, expressed the opinion that any man who held property which did not belong to him but to any infant, held that property as trustee for the infant within the meaning of s. 48 of the Act of 1881, notwithstanding that for the purposes of other Acts, and in other connections, the word "trustee" might have an entirely different meaning.

There would seem to be no distinction between an executor

(f) (1889) 42 C. D. 362.

(g) (1906) W. N. 220.

or an administrator with the Will annexed and an administrator in the case of a complete intestacy holding an ascertained residue.

When infant may be entitled to maintenance out of a contingent legacy.

An infant cannot, under s. 40 of the Act of 1881, be maintained out of the income of a contingent legacy, unless, if he attains twenty-one, he would become entitled to the past income, as well as the *corpus* of the property (h).

A direction to segregate a fund to provide for the gift is the equivalent of a contingent legacy of the fund plus its income (i).

But if the severance of a contingent deferred legacy from the general estate of a testator has been occasioned owing to the residue becoming payable before the legacy itself is payable, or from other cause unconnected with the legacy itself, such severance will not entitle the legatee to interim interest (k).

If a share of residue is given absolutely to an infant contingently on his attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and s. 48 will apply (l).

But if the infant only becomes tenant for life of the share of residue with the accretions on attaining twenty-one, the case does not fall within the language of s. 48, as interpreted by the Court of Appeal in *Re Dickson* (m).

No distinction in application of principle to a contingent class gift.

There is no distinction in the application of the principle between a contingent gift on attaining twenty-one to one person or two or more by name or to a class, whether capable of increase or not. The income of property given contingently to a class of persons belongs to its members for the time being, as against persons who are only entitled if and when the class ceases to exist. Each on attaining twenty-one is entitled to his share of the principal, and the increase which has been produced by it. The child who first attains twenty-one under such a class gift will receive only an aliquot share of the income in proportion to the number of existing children,

(h) *Re Dickson*, (1885) 29 C. D. 331.

(i) *Re Bowlby*, [1904] 2 Ch. 685, 704, per Vaughan Williams, L.J.; see also *Re Clements*, [1894] 1 Ch. 665.

(k) *Re Judkin's Trusts*, (1884) 23

C. D. 743.

(l) *Re Bowlby*, *ubi sup.*, at p. 711, per Cozens-Hardy, L.J.

(m) *Ibid.*

subject to be increased if any child should die under twenty-one. The income of the contingent shares independently of the statute would be accumulated for the benefit of those who may become alternately entitled to it. To the income of such a contingent share the statute applies (n).

The contingencies to which s. 48 of the Act of 1881 applies are "on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age." Consequently, the section would not apply where the gift is contingent on the legatee being alive at the death of another person, although there may be the additional contingency of the legatee attaining twenty-one years of age, since the legatee may never become entitled at all (o).

Contingencies to which s. 48 of the Conveyancing Act, 1881, applies.

Where there are two funds, the income of which may be applied for maintenance, in the absence of any discretion, the allowance for maintenance should be paid primarily out of that fund from which it is most for the infant's benefit that it should be taken (p).

Where there are two funds applicable for maintenance.

Although a contingent legacy does not carry interest while it is in suspense, yet in the case of a legacy by a parent or one standing in *loco parentis* to the legatee, the infant child, according to the practice of the Court of Chancery, is entitled to maintenance during minority out of the income of the legacy, unless the testator has provided another fund for his maintenance (q).

Maintenance out of contingent legacy where testator stood in *loco parentis*.

But, although it has been said that the legacy in such a case bears interest from the testator's death, the legacy is not the less a contingent one, and the infant does not acquire an immediate vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to the infant's representatives (r).

Where there is no absolute trust to apply income for maintenance, but merely a discretionary trust equivalent to a power,

Trustees in paying income for maintenance to parent must exercise discretion.

(n) *Re Holford*, [1894] 3 Ch. 30;
Re Jeffery, [1895] 2 Ch. 577.

(o) *Re Judkin's Trusts*, (1884) 25 C. D. 743, 749.

(p) *Re Wells*, (1889) 43 C. D. 281.

(q) *Re George*, (1877) 5 C. D. 837.

(r) *Re Bowlby*, *ubi sup.*

and the trustees, without exercising any discretion, pay over the income to the father of the infant child, he will be held liable to repay the whole amount received by him (s).

In such a case, if the trustees, in the *bond fide* exercise of their discretion, refuse to make any allowance for maintenance because they did not consider it necessary at present, or for the true benefit of the infant, the Court will not interfere to overrule their discretion (t).

The Court will, under special circumstances, direct allowances for past maintenance, also maintenance out of capital, and will direct the application of capital for the advancement of infants (u), but executors should not incur the risk of acting in any of these respects, except under an order of the Court, notwithstanding the established principle that if an executor does, without application, what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application (x).

Court will not interfere with *bond fide* exercise of discretion.

As to allowances for past maintenance, and maintenance out of capital.

(s) *Wilson v. Turner*, (1863) 22 C. D. 521.

(t) *Re Bryant*, [1894] 1 Ch. 323.

(u) See *Williams* (10th ed.) 1161 et

seq.

(x) *Lee v. Brown*, (1798) 4 Ves. 362, 369.

CANADIAN NOTES.

A testator directed that his estate should be invested and the income paid to his two sons equally until they reached the age of 35 when they were to receive the principal and he further declared that "none of my children shall have power to anticipate or alienate either voluntarily or otherwise any portion of my estate to which they may be entitled previous to the time at which the same may become payable to them as herein declared." One of the sons assigned his interest under the will to various creditors and it was held that the assignments were valid and the restriction on alienation invalid. *McFarlane v. Henderson* (1908), 16 O.L.R. 172.

Invalid
restriction
on
alienation.

Where there are two funds to be drawn from, for the benefit of infants, recourse must first be had to that which will ultimately be least beneficial to the infant. *Jones v. Smythe* (1899), 32 N.S.R. 95.

A testator by his will gave his estate to trustees in trust to pay over the net income to the support, maintenance and education of the children of his son until the youngest should attain the age of 21 years. Some of the children were of age and the others were minors. The father was able to support, maintain and educate the children. Held, that so much of the income as would be necessary should be paid to the father while he was under an obligation to support, maintain and educate the children, and did so, until the youngest child became of age. *Scholfield v. Vassie* (1899), 1 N.B. Eq. 637.

Infants entitled to maintenance out of a fund in the hands of the executor of their father's will, are entitled to have the fund brought into Court, although there is no imputation affecting the character or solvency of the executor. *Re Humphries, Mortimer v. Humphries* (1899), 18 P.R. 289. See *Whitewood v. Whitewood* (1900), 19 P.R. 183.

Infants
may have
fund
brought
into court.

Amount
allowed for
maintenance.

A testator bequeathed to his two infant sons \$4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate. It was held that these legacies carried interest from the death of the testator, and that a certain sum should be paid annually out of such interest to their mother for the purposes of their maintenance, and the executors should set apart the full amount of \$8,000 to provide for the payment of such legacies at the time provided, but that the question of the proper amount to be allowed, having regard to the income from the infants' shares in the residue should be now settled by the Master unless otherwise agreed upon. In such cases the amount to be allowed for maintenance must be governed by a consideration of the other circumstances, and a due regard to such other sources of funds as may be properly resorted to for such purpose. *Re McIntyre, McIntyre v. London & Western Trusts Co.* (1905), 9 O.L.R. 408.

Allowance
refused.

Testator bequeathed to his grandson his farm, implements, etc., but, by a codicil, provided that until the grandson attained the age of 21 years, the executors should keep, control and manage the farm, and expend the net revenue arising therefrom in the improvement and cultivation of the land, without accounting to the grandson or anyone else for such revenue. An application by the grandson, through his next friend, to have an annual allowance made to him for his support and education was dismissed on the ground that the testator having directed the surplus revenue to be used in the improvement of the farm, the money could not be diverted to another purpose. *Re Estate Waddell* (1902), 35 N.S.R. 435.

Life
insurance.

Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under sections 11 and 12 of R.S.O., c. 136, be paid to the executors if the will of the insured, as provided by section 12 without security being given by them, and payment to them is a good discharge to the insurers. *Dodds v. The Ancient Order of*

United Workmen (1894), 25 O.R. 570. See *Campbell v. Dunn* (1892), 22 G.R. 98. See also Ontario Insurance Act, R.S.O., c. 203, s. 155.

Moneys bequeathed directly to infant legatees and which had been invested by the defendants, the executors of the testatrix, were demanded of and received from them by a solicitor who had obtained from the Surrogate Court his appointment as guardian of the infants, and who subsequently misapplied the moneys and absconded. It was held that the executors were not liable. *Huggins v. Law* (1887), 14 A.R. 383. Misappropriation.

Money paid into Court to the credit of infants will not be paid out to their guardian, appointed by a Surrogate Court, as a matter of right; though in a proper case an allowance for their maintenance and education may be made to him out of such moneys. *Re Harrison* (1899), 18 P.R. 303. See *Re Mathers* (1897), 18 P.R. 13. Maintenance and Education.

A summary application by the guardian of infants for payment to him or into Court, by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed, where it was opposed by the administrator. *Re Coutts* (1893), 15 P.R. 162.

Where a testator left all his property to his executors for the benefit of his children and to his wife while she continued his widow and gave to his executors power to sell any of his real property for the support and maintenance of his children and widow, it was held that a reference might be directed to ascertain whether it would have been reasonable and proper for the trustees to apply any or what part of the land to the support and maintenance of the children. *Donald v. Donald* (1884), 7 O.R. 669. Maintenance.

Where an action was brought against an executor in this country to recover legacies bequeathed to infants, resident in Minnesota, of whom he had been appointed guardian by a Probate Court of Minnesota, and it appeared that the duties and powers of guardians under the laws of Minnesota were not greater than those of guardians appointed in this country,

Foreign
guardian.

it was held that the money must be paid into Court and not to the foreign guardian though, perhaps, the rule would be modified in a case where the sum was small and required for the infant's education and maintenance or other immediate use. *Flanders v. D'Evylyn* (1883), 4 O.R. 704. See *Mitchell v. Ritchey* (1867), 13 Gr. 445.

The duly appointed tutors in Quebec of an infant domiciled and residing there, which province had also been the domicile of the father at his death, were entitled to have paid over to them from the Ontario administrators of the father's estate, there being no creditors, money coming to the infant from said estate, which had been collected in Ontario. *Hanrahan v. Hanrahan* (1890), 19 O.R. 396.

Education.

The guardian appointed by the Court has the power of selecting the school at which the infant is to be educated, but is subject to the controlling power of the Court. The guardian, however, is not obliged to consult with the executors in respect to the education of the infant. *In re Taylor* (1897), 1 N.B.Eq. 461.

As to advancement to infant on account of legacy payable at majority, see *Re Currie* (1902), 1 O.W.R. 9.

A testator directed his executors 'to divide all my estate, share and share alike among my children and to pay' his or her share to each upon their respectively attaining 21 or marrying. The income, and if necessary part of the corpus, was to be expended upon maintenance and education. It was held that the direction to divide could not be separated from the direction to pay and that the period of vesting was postponed until they attained the age of 21 or married. *Re Sandison* (1907), 6 Terr. L.R., Part III., 313.

CHAPTER XLIII.

DESCRIPTION OF LEGATEES AND LEGACIES.

THE subject of the construction of Wills is not within the scope of this work, but it may be useful to state a few general rules, and in cases of difficulty the references will generally enable the reader to find the necessary information.

SECT. 1.—*Particular Modes of Description of Legatees.*

"Children."—This word, in its ordinary signification, and "Children," apart from the context of the Will, means legitimate children, and does not include grandchildren or other issue (*a*), but the context may show an intention to give it a wider signification (*b*).

Where a bequest is immediate to "children" as a class, children in existence at the death of the testator, including children *en ventre sa mère*, alone are entitled (*c*).

Immediate
gift to
children as
a class.

A gift of a certain sum to each of a class of objects at a future period—*e.g.*, who shall live to attain the age of twenty-one years—is confined to those living at the testator's death (*d*).

Gifts at a
future period.

To admit objects born after the testator's death and before the period of distribution, the total amount of the gift must be independent of the number of objects among whom it is to be divided, and is therefore not increased by the construction adopted (*e*). Thus where the division of the fund among the legatees is deferred until a particular period after the testator's death—as to the children of A. when a child or children attain a particular age, or to be divided amongst them at the death

(*a*) Williams (10th ed.) 853;
Hawkins on Wills, 80, 85; *Re*
Hopkins' Trusts, (1878) 9 C. D. 131, 137.

(*b*) *Re* Smith, (1887) 35 C. D. 558.

(*c*) Williams (10th ed.) 844.

(*d*) Rogers v. Mutch, (1878) 10 C. D.
25.

(*e*) Hawkins on Wills, 73.

of B.—any child who falls under the description at the time when the fund is to be divided is entitled to a share, but no child born after the period of distribution has any claim (*f*).

Gift in
remainder.

Where a particular estate or interest is given, with a gift over to the children of the person taking that interest, or the children of any other person, such gift over will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution (*g*).

Posthumous
child.

Under a devise or bequest to the child of X., or to the children of X., as a class living or born at a particular time, a child *en ventre sa mère* at the time and afterwards born alive is a child entitled under the devise or bequest (*h*). The basis of the rule is that the potential existence of such a child places it within the reason and motive of the gift, and therefore it makes no difference to the application of the rule that the bequest is to children "born previously to the date of this my Will" (*i*). The rule is, however, limited to cases where such a construction is necessary for the benefit of the unborn child (*k*).

The above rules with regard to class gifts to children extend to gifts to grandchildren, issue, brothers, nephews, cousins and similar class gifts (*l*).

Devise to a
man and his
children.

Where land is devised to a man and to his children, and he has no children at the time of the devise who could take concurrently with the parent, the parent, and the children in succession after him, take as tenants in tail; but if there had been children then in existence capable of taking at once concurrently with their parent, a fee simple would have been taken by the parent and the children concurrently, as joint tenants (*m*).

Legacy to a
man and his
children.

In a similar bequest of personal estate the parent takes an absolute interest where there have been no children at the

(*f*) Williams (10th ed.) 846; Andrews v. Partington, (1791) 3 Bro. C. C. 401; *Re Knapp's Settlement*, [1895] 1 Ch. 91.

(*g*) Jarman on Wills (5th ed.) 1011.

(*h*) Villar v. Gilbey, [1906] 1 Ch. 583, 594, per Cozens-Hardy, L.J.; and see *Re Salaman*, [1908] 1 Ch. 4, 6.

(*i*) *Re Salaman*, *ubi sup.*

(*k*) Villar v. Gilbey, [1907] A. C. 139.

(*l*) Hawkins on Wills, 68, 72.

(*m*) Wild's Case, (1600) 6 Rep. 16 b, 17 b; Clifford v. Koe, (1880) 5 App. Cas. 447, 453.

date of the Will or the death of the testator; but where there have been children living at the date of the Will or at the death of the testator they have been held to take the whole interest jointly with their parent. Slight circumstances, however, in the context, will justify the Court in holding that the parent shall take for life with remainder to his children (*n*).

The term "children" in a Will *prima facie* means legitimate children, but illegitimate children may be included in the description by a sufficient indication of intention (*o*). Legitimacy.

The rule extends to other blood relations not born in wedlock (*p*).

A bequest of personalty to the children of a foreigner means to his children whose legitimacy is established by the law of their father's domicile (*q*).

A gift to future illegitimate children, defined by reference to their paternity, will fail for uncertainty, as, in order to ascertain the persons, inquiries might be necessary, which the law forbids (*r*); but these considerations have no application to the case of the children of a female, and therefore a bequest to a woman's future illegitimate children is a good gift (*s*).

"Descendants" means children and their children and their children to any degree, and it is difficult to conceive any context by which the word "descendants" could be limited to mean children only (*t*). "Descendants."

"Issue" has the same meaning as descendants, but the meaning of the word may be limited by the context; and as a general rule, when there is a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word "issue" is cut down to mean children (*u*). "Issue."

(*n*) Williams (10th ed.) 848; Newill v. Newill, (1872) L. R. 7 Ch. 253.

(*o*) Hill v. Crook, (1873) L. R. 6 H. L. 265; Re Humphries, (1883) 24 C. D. 691.

(*p*) Seale-Hayne v. Jodrell, [1891] A. C. 304; Re Wood, [1902] 2 Ch. 542; Re Corbellis, [1906] 2 Ch. 316.

(*q*) Re Andros, (1883) 24 C. D. 637; and see *ante*, p. 145.

(*r*) See *ante*, p. 441.

(*s*) Re Loveland, [1906] 1 Ch. 542.

(*t*) Ralph v. Carrick, (1879) 11 C. D. 873, 883, per James, L.J.; and see Williams (10th ed.) 875.

(*u*) Sibley v. Perry, (1803) 7 Ves. 522; Pruen v. Osborne, (1840) 11 Sim. 132; Ralph v. Carrick, *ubi sup.*; and see Williams (10th ed.) 870.

In a gift of personalty to A. and his issue, the word "issue" may be either a word of limitation, in which case A. would take absolutely, or a word of purchase, in which case the same question arises as in gifts to A. and his children, whether A. and his issue take jointly or whether the issue take subject to a life interest in A. (x).

Under a bequest to "issue" or "descendants" *simpliciter*, all those who answer the description will take *per capita* as joint tenants (y).

"Relations."

"Relations."—This word is restricted to such relations as would have been entitled under the Statute of Distributions if the testator had died intestate, but the distribution must be *per capita* and not *per stirpes*, that is, the objects, but not the proportions, will be determined according to the statute. However, a gift of residue to be distributed "to my relatives, share and share alike, as the law directs," has been held to mean a distribution under the statute *per stirpes* and not *per capita* (z).

Under a bequest to "relations," only those can claim who are akin to the testator by blood, consequently a wife cannot claim as a relation of her husband, nor a husband as a relation of his wife (a).

"Poor relations."

A gift to "poor relations" is restricted to statutory next-of-kin, unless a perpetuity was intended and it can be construed as a charitable gift (b).

"Next-of-kin."

"Next-of-kin" (c).—If there is nothing to show that the testator had reference to the Statute of Distributions, or to a division as in the case of intestacy, the nearest of kin only are entitled (d). Hence a surviving brother will be entitled in

(x) See Theobald on Wills (7th ed.) p. 478, and *ante*, p. 544; and see *Re Coulden*, [1908] 1 Ch. 320.

(y) *Davenport v. Hanbury*, (1796) 3 Ves. 257; and see *Williams* (10th ed.) 1255, n. (b).

(z) *Williams* (10th ed.) 878; *Fielden v. Ashworth*, (1875) L. R. 20 Eq. 410.

(a) *Williams* (10th ed.) 880; *Worseley v. Johnson*, (1758) 3 Atk. 758.

(b) *Brunsdon v. Woolridge*, (1765) 1 Dick. 380; *Widmore v. Woodroffe*, (1766) Amb. 636, 640; *Att.-Gen. v. Duke of Northumberland*, (1878) 38 L. T. 345; *Theobald on Wills* (7th ed.) p. 353.

(c) See *Williams* (10th ed.) 881 *et seq.*

(d) *Smith v. Campbell*, (1815) 19 Ves. 400, 404.

exclusion of the children of a deceased brother or sister (*e*); and a father, mother, and child of the testator being equal in degree of proximity, will be entitled in joint tenancy (*f*).

Where there is a bequest to persons who would have been entitled under the Statute of Distributions, or to next-of-kin of the testator by reference to the statute, they take as if there had been an intestacy, and the shares are not taken in joint tenancy; and as a general rule the class must be ascertained at the time of the testator's death notwithstanding that the bequest is preceded by a life interest in the legacy and that the life tenant is himself one of the next-of-kin, and that the words "then entitled" are used in describing the persons to take in the event which happened of the life tenant dying without issue (*g*).

Under a bequest to the next-of-kin of a person who is dead at the date of the Will, if there is nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who, at the testator's death, are the next-of-kin of the deceased person named in the Will, will be the persons to take (*h*).

"Family."—Under a gift by a married man to his family, "Family," his children, if any living, alone take to the exclusion of other descendants (*i*) and of his wife (*k*).

"Wife."—*Primâ facie* where the wife of a person is spoken of by a testator and that person is married at the date of the Will, in the absence of any context the wife existing at the date of the Will is the person intended to take, to the exclusion of a second wife (*l*). But if the person was not married at the date of the Will, or at the death of the testator,

(*e*) *Brandon v. Brandon*, (1819) 3 Sw. 312; *Elmaley v. Young*, (1835) 2 M. & K. 780.

(*f*) *Withy v. Mangles*, (1843) 10 Cl. & F. 215; and see judgment of North, J., in *Re Gray's Settlement*, [1896] 2 Ch. 802, 804.

(*g*) *Bullock v. Downes*, (1860) 9 H. L. C. 1; *Re Wilson*, [1907] 2 Ch. 572.

(*h*) *Wharton v. Barker*, (1858) 4 K. & J. 483, 502; *Re Rees*, (1890) 44 C. D. 484.

(*i*) *Pigg v. Clarke*, (1876) 3 C. D. 672.

(*k*) *Re Hutchinson and Tenant*, (1878) 8 C. D. 540.

(*l*) *Re Drew*, [1899] 1 Ch. 336; *Re Coley*, [1903] 2 Ch. 101.

the legacy vests in the person who first answers the description (*m*).

A gift by a testator to his wife or to the wife of another means *primæ facie* his lawful wife, but it may appear that the testator used the description in a secondary sense as meaning the woman reputed as being his wife, though not in fact (*n*); or that the word "wife" was not such a part of the description as to amount to a condition that she should not take unless she filled the character of wife, as in the case of a subsequent divorce (*o*); or that the description is given for the purpose of ascertaining and identifying the individual named (*p*).

"Husband."—Similar principles apply as in the case of "wife" (*q*).

When a legacy is given to a person, under a particular character, which has been falsely assumed, and which alone can be supposed the motive of the bounty, the Court of Probate is the only Court which can listen to the allegation that the Will was obtained by fraud (*r*).

"Unmarried."

"Unmarried" primarily means "without ever having been married," that is, a bachelor or spinster, but the context may show a secondary meaning, namely, not having a wife or husband, as the case may be (*s*).

"Heir."

Where the word "heir" is used, not to denote succession or substitution but to describe a legatee (*e.g.*, "to my heir"), there is no reason to depart from the natural or ordinary sense of the word (*t*). On the other hand, where the word "heir" is used to denote succession or substitution, it may, according to the context, be construed to mean such person or persons as would legally succeed according to the nature and quality of the property, that is, the heir as to real estate, and next-of-kin as

(*m*) *Peppin v. Bickford*, (1797) 3 Ves. 570; *Radford v. Willis*, (1871) L. R. 7 Ch. 7.

(*n*) *Re Wagstaff*, [1907] 2 Ch. 35, and (C. A.) [1908] 1 Ch. 162.

(*o*) *Re Boddington*, (1884) 25 C. D. 685; see also *Re Horner*, (1887) 37 C. D. 695.

(*p*) *Anderson v. Berkley*, [1902] 1

Ch. 936.

(*q*) *Radford v. Willis*, *ubi sup.*

(*r*) *Meluish v. Milton*, (1876) 3 C. D. 27.

(*s*) *Re Chant*, [1900] 2 Ch. 345; and see *Re Brydone's Settlement*, [1903] 2 Ch. 84.

(*t*) *De Beauvoir v. De Beauvoir* (1846) 3 H. L. C. 524.

to personal estate (*u*). Where, however, personal estate is given with words of limitation which if applied to real estate would create an estate in fee simple or fee tail, the legatee will take absolutely (*x*).

In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund (*y*). But where there is no overriding or paramount intention to make provision for the children generally it would seem this principle does not apply (*z*).

"Eldest son."
"Younger children."

"Nephews and nieces" mean *prima facie* the children of a brother or the children of a sister, whether of the whole or half blood, and apart from the context they do not include more remote descendants (*a*).

"Nephews and nieces."

The tendency of later decisions has been to give to the word "cousin" its strict meaning as being a child of an uncle or aunt, and implying consanguinity, unless there is no person of the class (*b*). In a case where neither claimant was accurately described, it was held that the wife of a cousin might be popularly called a cousin (*c*).

"Cousins."

A bequest to servants of a year's wages does not extend to servants employed at wages calculated by the week or month, where the testator had several classes employed at yearly, weekly, and monthly wages respectively (*d*).

Servants.

The word "representatives" *prima facie* means legal personal representatives, or executors or administrators; but it is a flexible term, and on the construction of the Will it may

"Representatives."

(*u*) *Keay v. Boulton*, (1883) 25 C. D. 212.

(*x*) *Crawford v. Trotter*, (1819) 4 Madd. 361; *Appleton v. Rowley*, (1869) L. R. 8 Eq. 139, 145; and see *Williams* (10th ed.) 866.

(*y*) *Collingwood v. Stanhope*, (1869) L. R. 4 H. L. 43.

(*z*) *Law Union and Crown Insurance Co. v. Hill*, [1902] A. C. 263.

(*a*) *Re Blower's Trusts*, (1871) L. R. 6 Ch. 351; *Re Cozens*, [1903] 1 Ch. 138.

(*b*) *Wilks v. Bannister*, (1885) 30 C. D. 512, 517.

(*c*) *Re Taylor*, (1886) 34 C. D. 255.

(*d*) *Re Ravensworth*, [1905] 2 Ch. 1, following *Blackwell v. Pennant*, (1852) 9 Hare, 551.

mean either the next-of-kin or the descendants of the person referred to (e). But where the gift is to a person and his executors or administrators or representatives, the words added are merely words of limitation, and the legatee takes absolutely, and consequently should the legatee die in the lifetime of the testator the legacy will lapse (f).

SECT. 2.—*Particular Modes of Description of Legacies.*

"Effects."

Under a bequest of "all my plate, linen, furniture, and other effects," apart from any context to the contrary, the legatee will be entitled to the whole of the residuary personal estate. The words "other effects" are not to be cut down so as to mean that which is something like furniture, plate, or linen, on the principle of *ejusdem generis* (g).

The word "effects" will not *per se* include real estate, and the use of the word "devise" is not enough to give to "effects" a more extended meaning, but the whole context may show that the more extended meaning to include all property, whether real or personal, was intended (h).

"Goods and chattels."

The word "goods," and equally the word "chattels," taken simply and without qualification comprise the whole personal estate of every description (i).

"Household goods."

By the term "household goods" everything of a permanent nature, *i.e.*, articles of household use which are not consumed in their enjoyment, that were used in, or purchased, or otherwise acquired by a testator, for his house, including plate, will pass to the legatee; but not goods in the way of the testator's trade or business, nor sporting guns (k).

"Household furniture."

By the term "household furniture" all personal chattels will pass which may contribute to the use or convenience of the householder, or the ornament of the house, as plate, linen,

(e) *Re Horner*, (1887) 37 C. D. 695.

(f) *Appleton v. Rowley*, (1869) L. R. 8 Eq. 139.

(g) *Hodgson v. Jex*, (1876) 2 C. D. 122; *In the Goods of Jupp*, [1891] P. 300.

(h) *Smyth v. Smyth*, (1878) 8 C. D.

561; *Hall v. Hall*, [1892] 1 Ch. 361.

(i) *Kendall v. Kendall*, (1828) 4 Russ. 360, 370; and see *Re Prater*, (1888) 37 C. D. 481, 487; and *Re Robson*, [1891] 2 Ch. 559, 564.

(k) *Williams* (10th ed.) 930.

china, both useful and ornamental, and pictures (*l*); but not furniture in the possession of the testator in the way of his trade only and not reserved for his domestic or personal use (*m*); nor books unless there are special circumstances (*n*), as if the exclusion of a library would be to dismantle the house which is to be kept up for the family (*o*); nor wines (*p*); nor as a general rule tenants' fixtures, whether used in a private residence (*q*) or for trade purposes (*r*).

"Plate," properly so called, does not include plated "Plate." articles; but both will pass under a gift of all the furniture in the house, and an exception of "plate" will extend only to plate properly so called, that is to silver articles (*s*).

Growing crops will pass under a gift of stock on a farm as "Stock on against the devisee of the land (*t*). farm."

The word "moneys," *prima facie*, will be confined to ready "Moneys." money actually in hand, but a different intention may be gathered from the words of the Will (*u*). There are cases in which it has been held that the word money means the general estate or the residuary personal estate of the testator, as where the gift is in the form of money remaining after payment of debts and funeral and testamentary expenses (*r*), or a pecuniary legacy (*y*).

Where the bequest is of "ready money," money on "Ready deposit at a testator's bank subject to more than twenty-four money." hours' notice of withdrawal will not pass (*z*). But money on deposit at a testator's bank, whether notice of withdrawal is

(*l*) Williams (10th ed.) 933; and see *Cremorne v. Antrobus*, (1828) 5 Russ. 312.

(*m*) *Manning v. Purcell*, (1855) 7 De G. M. & G. 55.

(*n*) *Cremorne v. Antrobus*, *ubi sup.*

(*o*) *Ouseley v. Anstruther*, (1847) 10 Beav. 462.

(*p*) *Porter v. Tournay*, (1797) 3 Ves. 311.

(*q*) *Finney v. Grice*, (1878) 10 C. D. 13.

(*r*) *Re Seton-Smith*, [1902] 1 Ch. 717.

(*s*) *Holden v. Ramsbottom*, (1863) 4 Giff. 205.

(*t*) *Re Roose*, (1880) 17 C. D. 696.

(*u*) *Langdale v. Whitfield*, (1858) 4 K. & J. 426, 432; *Williams v. Williams*, (1878) 8 C. D. 789.

(*x*) *Re Smith*, (1889) 42 C. D. 302; *Re Egan*, [1899] 1 Ch. 688.

(*y*) *In the Goods of Bramley*, [1902] P. 106.

(*z*) *Re Wheeler*, [1904] 2 Ch. 66; *Re Price*, [1905] 2 Ch. 55, 56.

or is not required, will pass under a bequest of "moneys owing to me at the time of my decease" (a).

"Securities."

In the absence of any context or admissible evidence to the contrary, the word "securities" will be confined to money secured on property. But the word is a flexible one and is widely used as a synonym for "investments," and the Will may show that the testator so used the word, in which case it will include stocks and shares in companies (b).

SECT. 3.—Errors in Names or Descriptions of Legatees and Legacies.

The true intention of the testator may be ascertained either by the context or by evidence of surrounding circumstances.

Error in name.

An error in the name, and even of the name and sex, of the legatee may be set right by the accuracy of the description; so an error in the description may be set right by the certainty of the name (c). Also the omission of a name or a mistake in the number of a class may be supplied by the context (d). Where the error is in the number of a class the rule is that if the actual number is larger than is stated the larger number take (e). The principle also applies to the converse case where the number of the children in existence is less than that specified in the Will (f).

Error in description.
Omission of name.

Mistake in number of class.

Evidence of circumstances and state of testator's family.

Evidence is admissible of the circumstances, the habits, and the state of the testator's family at the time he made his Will, so as to put the Court in the position of the testator, in order to ascertain the bearing and the application of the language which he uses, and whether there exists any person or thing to which the whole description given in the Will can

(a) *Re Derbyshire*, [1906] 1 Ch. 135.

(b) *Re Rayner*, [1904] 1 Ch. 176;
Re Gent and Eason's Contract, [1905] 1 Ch. 386.

(c) *Williams* (10th ed.) 903, and cases cited; and see judgment of Fry, J., in *Garland v. Beverley*, (1878) 9 C. D. 213, 216.

(d) *Williams* (10th ed.) 904, 909, and cases cited.

(e) *Garvey v. Hibbert*, (1812) 19 Ves. 125; *Newman v. Piercey*, (1876) 4 C. D. 41; *Re Groom*, [1897] 2 Ch. 407; *Re Sharp*, [1908] 1 Ch. 372.

(f) *Re Sharp*, *ubi sup.*, affirmed (1908) W. N. 146.

be, with sufficient certainty, applied. But evidence of the declarations of a testator as to whom he intended to benefit, or supposed that he had benefited, can only be received when the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons or to two things (g).

Declarations of testator except in cases of equivocation inadmissible.

Similar rules apply with regard to construction and the admissibility of extrinsic evidence to ascertain the subject matter devised or bequeathed as to ascertain the person intended to be benefited (h).

Evidence of the amount of a testator's personal estate at the time of making his Will is, in general, inadmissible, since the Will speaks from the death of the testator, and consequently its amount at the date of the Will could not in general form a just ground of inference as to the meaning of the testator's words. But such evidence may be material and admissible under special circumstances, as where the testator meant to give a species of stock, but the description of the subject is not intelligible on the face of the Will, or where it is apparent that the testator has made a wrong calculation of the value of his fortune, showing thereby that it was with reference to the actual state of his property that the bequests were made (i).

Evidence of amount of property at date of Will.

Where there is a subject-matter to which all the terms of the description apply, no part of them can be rejected as *falsa demonstratio*. The words of the Will must first be construed, and then the extrinsic evidence may be looked at to see whether there is anything which those words fit. Where there is no subject matter to which all the testator's words apply, the Court has to consider on the evidence what is the substance of his gift (k).

Falsa demonstratio.

Where a testator erroneously recites that a legatee owes him a particular sum or advance, and directs the legatee to

Erroneous recital.

(g) *Charter v. Charter*, (1874) L. R. 7 H. L. 364; and see *Re Grainger*, [1900] 2 Ch. 756; [1902] A. C. 1, where the admissibility of extrinsic evidence in aid of the interpretation of Wills is discussed.

(h) Numerous instances and cases are given in Williams (10th ed.) 927—954.

(i) *Re Grainger*, [1900] 2 Ch. 756, 768, per Rigby, L.J.

(k) *Re Seal*, [1894] 1 Ch. 316.

bring that sum or the sum "hereinbefore recited to have been advanced" into hotchpot, or otherwise shows an intention to charge the legatee with the sum mentioned, that sum, whether due or not, must be brought into hotchpot. But if the testator merely directs the alleged advance "or so much thereof as shall remain unpaid" at his death, or at the time of distribution, to be brought into hotchpot, he *prima facie* intends the amount actually due, and not the alleged advance less repayments, to be brought into hotchpot (*l*).

(*l*) *Re Kelsey*, [1905] 2 Ch. 465.

CANADIAN NOTES.

A child *en ventre* at testator's death is within the meaning of a residuary disposition in favour of children, although the children are named in the will. *Aldwell v. Aldwell* (1874), 21 Gr. 627.

"Children," as legally construed, means immediate offspring. *Paradis v. Campbell* (1883), 6 O.R. 632. Held not to include grandchildren. *In re Williams* (1903), 5 O.L.R. 345. Taken in primary sense, excluding grandchildren. *Rogers v. Carmichael* (1892), 21 O.R. 658. On the facts in case of a gift to a son, construed in its primary meaning of descendants of the first generation only. *McPhail v. McIntosh* (1887), 14 O.R. 312; *Gourley v. Gilbert* (1867), 12 N.B.R. at p. 85. See also *Re Spring* (1908), 12 O.W.R. 420.

In Saskatchewan and Alberta it has been enacted that if in any will of a testatrix any devise or bequest is made to her issue or to her child or children, illegitimate children may take. In the absence of such special legislation, child, in the Wills Act, means legitimate child. *Hargraft v. Keegan* (1886), 10 O.R. 272. See *Doe dem. McEacheran v. Taylor* (1849), 6 N.B.R. 525.

"Child or children," read as *nomen collectivum*, "child," under the circumstances, was not a *designatio personæ*, but comprehended a class. *Stobbart v. Guardhouse* (1884), 7 O.R. 239. And see *Re Mackinlay* (1905), 38 N.S.R. 254.

"Children and children's children," words of purchase. *Peterborough R. E. Co. v. Patterson* (1888), 15 A.R. 751.

"Children by first marriage," was satisfied by children of a second marriage. *Ling v. Smith* (1877), 25 Gr. 246.

"Children or their heirs," construed "children or their issue." *In re Gardner* (1902), 3 O.L.R. 343.

"Children if any at her death," with a devise over if there are no children, are not words of limitation. *Grant v.*

Fuller (1902), 33 S.C.R. 34. *Chandler v. Gibson* (1901), 2 O.L.R. 442.

"Heirs," held not to include the widow. *Bateman v. Bateman* (1870), 17 Gr. 227. May sometimes mean "children," but that meaning will only be given to it when it is clear that the property was intended to go to the children. *Scott v. Gohn* (1882), 4 O.F. 457; *Otty v. Crookshank* (1881), 21 N.B.R. 169. Held, used in a colloquial, and not a technical sense, as meaning "children." *Paradis v. Campbell* (1883), 6 O.R. 632. On the facts construed as description of intended legatees. *In re Biggar, Biggar v. Stinson* (1884), 8 O.R. 372. On the facts held not to include widow but to include brother. *In re Estate of Woodworth* (1861), 5 N.S.R. 101. Read to include brothers and sisters. *Sparks v. Wolff* (1898), 25 O.A.R. 326. To widow for life and "then to heirs" construed to refer to her heirs and not to the heirs of testator. *Re Newbigging* (1907), 10 O.W.R. 213.

"Cousins" include first cousins only. *Higginson v. Kerr* (1899), 30 O.R. 62.

"Lawful heirs," see *Thompson v. Smith* (1894), 25 O.R. 652, 23 O.A.R. 29.

"Heirs at law," on the facts construed to mean next of kin. *Harrison v. Spencer* (1888), 15 O.R. 692. In a case not controlled by the Act abolishing primogeniture, construed to mean common law heir, or eldest son. *Baldwin v. Kingstone* (1890), 18 O.A.R. 63, distinguished in *Sparks v. Wolff* (1898), 25 O.A.R. 326. See *Re S. and N.* (1908), 12 O.W.R. 339.

"Right heirs," means those who would take real estate as upon an intestacy, and not next of kin. *Coatsworth v. Carson* (1893), 24 O.R. 185, 24 O.A.R. 61, 28 S.C.R. 38; *Re Karn* (1903), 2 O.W.R. 841; *Tyler v. Deal* (1873), 19 Gr. 601.

"Next in heirship," construed to mean the heirs at law to the realty and the statutory next of kin to the personalty. *In re Gardner* (1902), 3 O.L.R. 343.

"Poor" relatives, the word "poor" rejected as indefinite. *Ross v. Ross* (1893), 25 S.C.R. 307.

"Issue," construed to mean "children." *Re Hamilton* (1889), 18 O.R. 195; *Eville v. Smith* (1908), 44 C.L.J. 585. *Primâ facie* means "heirs of the body." *King v. Evans* (1895), 24 S.C.R. 356. See *Fisher v. Anderson*, 4 S.C.R. at p. 415; *Shaw v. Thomas*, 19 Gr. 489. But in section 32 of Wills Act the word is construed strictly and does not include "heirs." *Re Brown and Campbell* (1898), 29 O.R. 402.

"Without issue," does not import an indefinite failure of issue. *Ashbridge v. Ashbridge* (1892), 22 O.R. 146; *Martin v. Chandlor* (1894), 26 O.R. 81. "Dying without issue," see *Re Johnston* (1906), 12 O.L.R. 262.

"Nearest of kin," *primâ facie* means the nearest blood relations of the testator at the time of his death in an ascending and descending scale. *Brabant v. Lalonde* (1895), 26 O.R. 379.

"Family," was held intended to include the widow. *Danson v. Fraser* (1889), 18 O.R. 496. But it primarily means children only. *Harkness v. Harkness* (1905), 9 O.L.R. 705; *Anderson v. Bell*, 29 Gr. 452. See *Ferguson v. Stewart*, 22 Gr. 364; *Ward v. McKay*, 41 N.S.R. 97.

"Offspring," can be read as "issue" or "children." *Sweet v. Platt* (1886), 12 O.R. 229. See *McDonald v. Jones* (1898), 40 N.S.R. at p. 235.

"To my wife," where the testator had lived in the relationship of husband and wife with two women. See *Marks v. Marks* (1908), 13 B.C.R. 161; 40 S.C.R. 210.

"Survivor," means longest liver, not "other." *Ashbridge v. Ashbridge* (1892), 22 O.R. 146. See *Re Mackinlay* (1905), 38 N.S.R. 254.

"Personal representative," means executors or next of kin. *Re Dauberry* (1902), 1 O.W.R. 773. See as to "legal personal representatives." *Kerr v. Smith* (1896), 27 O.R. 409. See also *Re Ianson* (1907), 14 O.L.R. 82.

"Representatives," *primâ facie* means "executors or administrators," but the context may make the word mean "next of kin." *Burkitt v. Tozer* (1889), 17 O.R. 587.

EXECUTORS.

"Executors and administrators," equivalent to "heirs," as a word of limitation. *Mercer v. Neff* (1898), 29 O.R. 680.

"Grandson," held *prima facie* to exclude illegitimate grandson. *Doe v. Taylor* (1849), 1 Allen (N.B.) 525.

"Effects," held wide enough to carry real estate. *Hammill v. Hammill* (1884), 9 O.R. 530.

"Personal effects," will pass a beneficial interest in a mortgage. *In re Way* (1903), 6 O.L.R. 614.

"Chattels," held to include a mortgage. *In re McMillan* (1902), 4 O.L.R. 415. See *Peterson v. Kerr*, 25 Gr. 583; *Davidson v. Boomer*, 15 Gr. 1.

"Estate," in a will will pass realty. *Cameron v. Harper* (1891), 21 S.C.R. 273.

"All my estate real and personal" by a Bishop who was a corporation sole, passed private property, though preceded by a recital applicable to church property. *Travers v. Casey*, 34 S.C.R. 419.

"Worldly estate," includes not only the corpus of the testator's property but the whole of his interest therein. *Town v. Borden* (1882), 1 O.R. 327.

"Properties," in a will held to pass real estate. *Re Hargan and Fritzginger* (1888), 16 O.R. 28.

"Property," in a will will pass realty. *Cameron v. Harper* (1891), 21 S.C.R. 273.

"Legacy," includes annuity. *Wilson v. Dalton*, 22 Gr. 160; *Woodside v. Logan*, 15 Gr. 145. But it does not include devise. *Edwards v. Smith*, 25 Gr. 150.

"Home." A gift of "a home as long as she remains single" probably includes maintenance until majority in case of an infant. *Augustine v. Schrier* (1889), 18 O.R. 192. See construction of "the homestead," *Bigelow v. Bigelow*, 19 Gr. 549. See "to use it for a home," *Cameron v. Adams* (1895), 25 O.R. 229.

"Curtilage and buildings," defined. *Thompson v. Jose*, 10 O.W.R. 173.

"Stock," was not confined to live stock on the farm, but included the hay and crop grown on the farm which had been

severed at the time of the death. *Wetmore v. Ketchum* (1862), 10 N.B.R. 408. For "stock and trade," see *Re Holden*, 5 O.L.R. 156.

"Dower," held not used in a technical legal sense, but as meaning one-third absolutely of testator's estate. *Re Manuel Estate* (1906), 12 O.L.R. 286.

"Proceeds," read as "income." *Chubbock v. Murray* (1897), 30 N.S.R. 23.

"Vested," construed as vested in interest. *Stinson v. Stinson*, 21 Gr. 116.

"All my money in the bank or funds," held not to include money contained in a chest. *In re Estate of Catherine Barry* (1874), 9 N.S.R. 463.

Mere misnomer of legatee, see *Re Mitchell* (1904), 4 O.W.R. 43; *Reeves v. Reeves* (1908), 12 O.W.R. 124.

"The parties mentioned in my will," means the parties mentioned as beneficiaries. *Re Miles* (1907), 14 O.L.R. 241.

"Premises," construed in *Martin v. Martin* (1904), 8 O.L.R. 462.

"Proceeds of a farm," see *Casselman v. Hersey*, 32 U.C.R. 333.

"A devise of rents," is equivalent to a devise of the land. *Re Thomas* (1901), 2 O.L.R. 660.

"Advancement," defined. *Re Lewis*, 29 O.R. 609.

"Between," defined. *Hutchinson v. La Fortune*, 28 O.R. 329. *Re Ianson* (1907), 14 O.L.R. 82.

"Die childless," means die without leaving any children at the time of the death of the person referred to. *Re Thomas & Shannon* (1898), 30 O.R. 49. See *Gourley v. Gilbert*, 12 N.B.R. 80; *Vanluven v. Allison* (1901), 2 O.L.R. 198.

"Having already given to my son lot number one," does not of itself constitute a devise. *Doe dem. Smith v. Myers*, 2 O.S. 301. Nor "having already conveyed to my daughter." *Miles v. Coy* (1866), 12 N.B.R. 174.

All my real estate . . . being composed of the South East part of lot 10 Afterwards testator acquired the

northerly half of lot 10. Held, that the after acquired property passed under the devise. *Re Smith* (1905), 10 O.L.R. 449.

"Including," imports something in addition. *Re Dunscombe* (1902), 3 O.L.R. 510.

"Pay or apply," when applied to shares in realty does not necessarily work a conversion thereof, where they consist of vested equitable estates in remainder. *McDonell v. McDonell* (1894), 24 O.R. 418.

Pro rata in a direction to divide a residue amongst legatees previously named in a will, means in proportion to the respective amounts of their legacies. *Kennedy v. Protestant Orphans' Home* (1894), 25 O.R. 235.

"Public securities," does not include municipal debentures. *Ewart v. Gordon* (1867), 13 Gr. 40.

"Protestant charitable institutions," refers to the objects, as well as the government, of such institutions, and includes those designed for and managed by Protestants. *Manning v. Robinson* (1898), 29 O.R. 483.

"Or otherwise." In a bequest of money on condition that a like sum should be procured "by a tax on the citizens or from private donations or otherwise," it was held that a sum procured by a grant from the legislature was within the expression "or otherwise." *Paulin v. Windsor* (1904), 36 N.S.R. 441.

"Revert," not given its technical meaning under special circumstances. *Jardine v. Wilson* (1872), 32 U.C.R. 498. See *Osterhaut v. Osterhaut* (1904), 7 O.L.R. 402, 8 O.L.R. 685.

An option to purchase land given to three legatees cannot be exercised where all three desire to purchase, and the land therefore passes under an alternative disposition in the will. *Jeffrey v. Scott* (1879), 27 Gr. 314.

An option to a person named in a will to redeem incumbered land gives him an absolute title on redemption, the incumbrances nearly equaling the value of the land. *Stevenson v. Stevenson* (1881), 28 Gr. 232.

"In the event of Phillip's death all and anything I have willed him shall go back to my estate," held not to be given their ordinary meaning and effect when appearing in a codicil, owing to the terms of a clause in the will itself and the circumstances under which the codicil was drawn and executed. *Re Meudell* (1908), 11 O.W.R. 1093.

Money was bequeathed to a daughter "to hold and be enjoyed by her while she remained unmarried," with a bequest over in case of her death or marriage. Held, that she was only entitled to the income, and not to the possession or disposition thereof. *Daly v. Brown* (1907), 39 S.C.R. 122.

"Equally," defined. *Re Ianson* (1907), 14 O.L.R. 82.

"That is to say," merely particularizes what was general before. *Re Hudson* (1908), 16 O.L.R. 165.

I give . . . all my estate . . . to my sister for her own use with power to sell or dispose of the same as she may see fit, . . . and after the death of my said sister I desire the remainder of my estate, if any, to be equally divided between, etc., *semble*, gives a life estate only to the sister. *Roman Catholic Corporation of Toronto v. O'Connor* (1907), 14 O.L.R. 666.

"Appurtenances," may be applied to personalty. *Re Hudson* (1908), 16 O.L.R. 165.

A gift or devise will not fail for a misdescription or an imperfect or inaccurate description of a legatee or devisee, if the description is sufficient to designate with reasonable certainty the object of the testator's bounty. Therefore, the Methodist Church may take under a gift to "The Missionary Society of the Methodist Church in Canada." *Tyrrell v. Senior* (1893), 20 A.R. 156.

A testator, owning real and personal property, bequeathed "to my executors . . . in trust to dispose thereof to best advantage, in trust, to be divided, etc.," without mentioning any property. The Court read the words "my property" into the blank in the will as presumably unintentionally omitted. *Colvin v. Colvin* (1892), 22 O.R. 142. And see

May v. Logie, 27 S.C.R. 443; *Re Holden*, 5 O.L.R. 156. But a gift of an unnamed sum is void. *Brewster v. Foreign Mission Board*, 2 N.B.Eq. 172.

In *Lasby v. Crewson* (1891), 21 O.R. 93, where there was a direction to divide the estate into impossible fractions, the Court assumed that the testator's intention was to express that each son should have double the portion of each daughter.

In *Steele v. Grover*, there was a bequest in trust for a certain class of the poor of the county. A town in the county originally formed part thereof for all purposes. Poor residents of the town were included within the benefits of the bequest. *Steele v. Grover* (1894), 26 O.R. 92.

For instances of reception and rejection of extrinsic evidence for the purpose of aiding in the construction of wills, see *Forsyth v. Galt* (1871), 22 U.C.C.P. 115; *Lawrence v. Ketchum* (1878), 28 U.C.C.P. 406; *Ruthven v. Ruthven* (1878), 25 Gr. 534; *Thompson v. Jose* (1907), 10 O.W.R. 173.

Testator devised to his son G. "the property I may die possessed of in the Village of M.; also lot 28 in the 10th concession of B." Testator did not own lot 28, and the only land he did own in the 10th concession was a part of lot 29. The will contained no residuary devise. Held, that the part of lot 29 did not pass to G. *Re Bain v. Leslie* (1894), 25 O.R. 136. But in *Hickey v. Hickey* (1891), 20 O.R. 371, where a testator, owning lots 6 and 8 in the first concession, devised the same in his will in two separate devises as "my property known as lot , second concession, etc.," his lots in the first concession were held to have passed.

Lot 14, concession 10, in the Township of A. was devised. Testator never had owned that lot, but did own lot 21, concession 10. Evidence of the testator's intention to devise lot 21 was rejected and the devisees were not allowed to take lot 21. *Summers v. Summers* (1882), 5 O.R. 110, distinguished in *Re Shaver* (1884), 6 O.R. 312, where a testator devised as follows: "I devise the south-west quarter of lot 5, concession 2, of Westminster, containing 50 acres more or

less, etc." The evidence shewed that the testator did not own the south-west quarter but did own the south-east lot of 50 acres, on which he and the devisees had lived for many years. The devisees took the south-east lot. And see *Hickey v. Stover* (1885), 11 O.R. 106; *Wright v. Collings* (1888), 13 O.R. 182; *Nicholson v. Burkholder* (1861), 21 U.C.Q.B. 108; *McDonald v. McPhail* (1859), 17 U.C.Q.B. 299; *Hanley v. Miller* (1862), 12 U.C.C.P. 70; *O'Day v. Black* (1871), 31 U.C.Q.B. 38.

In a devise to two or more persons equally, the word "equally" refers to the area of the land, not the estates of each therein. *Fraser v. Fraser* (1896), 26 S.C.R. 316.

Where a testator used the expression "bequeath" when disposing of land, legatee was held to include devisee. *Patterson v. Hueston* (1885), 40 N.S.R. 4.

A gift of money in a residue, to be distributed after a life estate, imports a trust for conversion, and so includes all that would be money at that time. *Ferguson v. Stewart*, 22 Gr. 364.

In *Hotby v. Wilkinson* (1881), 28 Gr. 550, it was held that "200 acres of land, the west half of lot No. 14," was *falsa demonstratio* of the west half, the testator having referred to the whole lot as being 200 acres in the subsequent part of the will. And see *Saunders v. Breakie* (1884), 5 O.R. 603.

Testator had a legitimate grandson, Rufus, living in a foreign country, whom he had only seen once, about six years before making his will. He also had an illegitimate grandson, Rufus, whom he had brought up and educated. There was a gift in the will to "my grandson, Rufus." Held, that there was nothing on the face of the will to shew that testator intended the illegitimate grandson to take. Parol evidence to shew the testator's real intention was excluded. *Doe v. Taylor* (1849), 6 N.B.R. 525.

A testator bequeathed a sum of money to his "sister, Anastatia Cummings." He had only two sisters, Catherine Kelly, to whom he bequeathed a like sum, by the proper

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name, and Maria Cummins. Held, that the gift took effect in favour of Maria Cummins. *Re Whitty* (1899), 30 O.R. 300.

In the case of a lot described by a wrong number the number was rejected as *falsa demonstratio*. *Doyle v. Nagle* (1897), 24 A.R. 162.

CHAPTER XLIV.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR TO ACCOUNT.

AN executor or administrator must account for all profits which have accrued in his own time, either spontaneously, or by his acts, out of the estate of the deceased (a).

Executor or administrator must account for all profit out of the estate of the deceased.

So also if he make a profit from his office, as, for instance, being appointed executor and trustee, he subsequently retires from the trust in consideration of a money payment to enable another to be appointed in his place, the sum paid to him shall form part of the testator's assets for which he must account (b).

Also for profit arising from his office.

It would seem, however, that where a shareholder in a company in respect of shares held by him as trustee is thereby qualified to act, and acts as director of the company, his remuneration as director is not a profit made from his office of trustee, and he is under no liability to account (c).

Nor can an executor or administrator be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (d).

He cannot purchase any part of assets.

Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behalf, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. All losses are charged on the wrongdoer, while no profit can ever accrue to him (e).

On violation of duty he is charged with all losses and must account for all profit.

(a) Williams (10th ed.) 1482.

(b) Sugden v. Crossland, (1836) 3 Sm. & G. 192.

(c) *Re* Dover Coalfield Extension, Ltd., [1908] 1 Ch. 63.

(d) Williams (10th ed.) 1487, and see *ante*, p. 217.

(e) Per *Ld.* Brougham in *Docker v. Somes*, (1834) 2 My. & K. 655, 664.

For breach of trust he and all accomplices are severally liable.

Breach of trust in carrying on business.

Rule as to election between interest and share of profits.

If an executor or administrator commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest (*f*).

If the breach of trust consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent. (*g*). But as to a partnership business a general decree for an account of the profits of the business cannot be made in the absence of some of the surviving partners, and one surviving partner being an executor or administrator cannot, it would seem, be made answerable for the whole of the profits made in trade by the employment of the capital of the testator or intestate without justification, those profits having been received not merely by the executor or administrator but by other partners, without bringing all the partners before the Court, and subjecting them to any liability under the decree (*h*).

If the beneficiaries repudiate the arrangement by which the personal representative of the deceased wrongfully employed money in partnership, it may be inferred from the judgment in *Jones v. Forall* (*i*) that they would have to elect between interest and that share only of the profits made in respect of the capital which actually came into his hands.

The rule, however, as to election between interest and profits would seem to be inapplicable to the case of an actual loan by a trustee in breach of trust to himself and others (*k*).

Where a trustee has mixed trust funds with his private

(*f*) *Vyse v. Foster*, (1872) L. R. 8 Ch. 309, 329, per James, L.J.

(*g*) *Ibid.*

(*h*) *Vyse v. Foster*, L. R. 7 H. L. 318, 334, per Ld. Cairns; and see *Flockton v. Bunning*, (1864) in note to *Vyse v. Foster*, L. R. 8 Ch. 323.

(*i*) (1852) 15 Beav. 388, but the authority of this case to its circumstances was questioned by Ld. Selborne in *Vyse v. Foster*, *ubi sup.*, at p. 345.

(*k*) See observations of Ld. Selborne, *ibid.*

money, and has employed both in a trade or adventure of his own, the *cestui que trust*, if he prefers to insist on profits instead of interest, can only insist on a proportionate share attributable to such employment (l).

With regard to charging the personal representative with interest the rule is stated as follows by Sir John Romilly in *Jones v. Foxall* (m)—“Generally, it may be stated, that if an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at 4 per cent. on these balances; if, in addition to such retention, he has committed a direct breach of trust, or if the fund had been taken by him from a proper state of investment in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum; if, in addition to this, he has employed the money so obtained by him in trade speculation, for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest.”

Interest on
balances
retained.

So in *Attorney-General v. Alford* (n) an executor and trustee, who had for several years retained funds in his hands uninvested which he ought to have invested, was held not to be chargeable with interest at 5 per cent. or upon the principle of annual rests, but with simple interest only at 4 per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct, and Lord Cranworth observed: “What the Court ought to do, I think, is to charge him only with the interest which he has received or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it.”

Where personal representatives are liable to be charged with interest on sums improperly paid or improperly retained

(l) *Docker v. Somes*, (1834) 2 My. & K. 655; *Wedderburn v. Wedderburn*, (1838) 4 My. & Cr. 41.

(m) (1852) 15 Benv. 388.

(n) (1855) 4 De G. M. & G. 843.

by them, it makes no difference that they acted *bona fide* and distributed the assets upon what turns out to be an erroneous construction of the Will (o). But in order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount. Where the total balance retained arising from personal estate amounted to less than £96, and the total share of rents of leasehold estate a little more than £88, and the testatrix died in 1828, and the bill was filed in 1842 in which the plaintiff, who was in a position to ask for accounts long before, claimed interest on balances, he was held not entitled (p).

No interest charged on balance found due in consequence of items disallowed,

An executor or administrator who, acting honestly, makes payments which are disallowed in taking his accounts, and balances are in consequence found due from him which are ordered to be paid into Court, will not be chargeable with interest thereon (q).

nor on arrears of income unpaid to a life tenant.

The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid to a life tenant (r).

Compound interest.

Although as a general rule only simple interest is charged on balances in hand, yet where there is an express trust for accumulation, compound interest upon such balances will be chargeable (s).

Order on further consideration as to interest without wilful default being charged.

In a proper case it is competent for the Court, upon the further consideration of an action, to charge interest whether simple or compound, on such balances, although no case of wilful default was raised by the pleadings and the question of interest was not referred to in the judgment (t).

Principle upon which interest is computed.

Where money is retained in the hands of trustees and made use of by them, the Court presumes the rate of interest made upon the money to be the ordinary rate of interest, namely, 5 per cent. The Court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's

(o) *Re Hulkes*, (1886) 33 C. D. 552.

(p) *Miles v. Durnford*, (1852) 2 Sim. (N. S.) 241.

(q) *Re Jones*, [1897] 2 Ch. 190, 199.

(r) *Blogg v. Johnson*, (1867) L. R.

2 Ch. 225.

(s) *Re Barclay*, [1899] 1 Ch. 674.

(t) *Ibid.*

money by directing rests or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, 5 per cent. or compound interest as the case may be. If the Court finds that the money received has been invested in an ordinary trade, it will presume that the party against whom relief is sought has made the amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made. But a solicitor's business is not such a business. A solicitor's profit arises from the time and the labour which he bestows upon cases in which he is engaged. There is nothing like compound interest obtained upon the money employed by a solicitor. On the contrary, he is frequently out of pocket for a considerable period by the moneys he expends and upon which he receives no interest. It was accordingly held that in such a case no profit can be necessarily inferred, and consequently compound interest ought not to be directed (*u*).

In charging interest on balances in hand according to the practice now adopted, the rate is 8 per cent. instead of 4 per cent. (*x*). Rate of interest charged.

It would seem that the same rate is now chargeable in the case of a direct breach of trust in investing in unsecured investments, since it must be treated as if it had been made and the trust money had remained in hand uninvested (*y*).

Where trust money is wrongfully employed in trade or speculative transactions, and the *cestui que trust* elects to charge interest instead of having an account of profits, the rate is still 5 per cent. (*z*).

As to what allowances the personal representative will be entitled to in accounting— Allowances.

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct Reasonable expenses.

(*) *Burdick v. Garrick*, (1870) L. R. 5 Ch. 233, 241.

(*) *Re Barclay*, *supra*.

(y) *Ibid.*, and see *Wyman v. Paterson*, [1900] A. C. 271.

(z) *Re Davis*, [1902] 2 Ch. 314.

of his office except those which arise from his own default (a). And Ord. 88, r. 8 of R. S. C. provides that in taking any account by any judgment or order all just allowances shall be made without any direction for that purpose.

No allowance
for personal
trouble or
loss of time.

It is a general principle that an executor or administrator shall have no allowance for personal trouble and loss of time in the execution of his duties (b). The Will, however, under which the executor is appointed may make provision for his remuneration; but such a clause being in effect a legacy he cannot claim it as against creditors if the estate should prove insolvent (c).

No person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing no improper charges are made (d). The principle is based upon the consideration that the Court of Equity will not allow a man to place himself in a position in which his interest and duty are in conflict (e). So an executor or administrator a member of a banking firm cannot charge banker's commission paid to the bank against the estate (f), nor being an auctioneer can he charge commission on sale of assets (g). This principle applies not only in the case of one trustee, but to the case where he is a partner with others, and the charge is made by the partnership (h).

Principle
applies to
firm of which
trustee is
partner.

Rules applic-
able to
solicitor,
executor or
adminis-
trator.

In respect of this general principle, a solicitor, executor or administrator, is in the same position as a broker, commission agent, or the like. He is allowed his costs out of pocket, that is to say, the expenditure, but not anything for his time or trouble (i).

In the absence of any provision to the contrary in the Will

(a) Williams (10th ed.) 1574.

(b) *Ibid.*, 1497.

(c) *Re White*, [1898] 1 Ch. 297;
2 Ch. 217.

(d) *Broughton v. Broughton*, (1856)
5 De G. M. & G. 160, per Ld.
Cranworth.

(e) *Re Barber*, (1886) 34 C. D. 77,

81, per Chitty, J.

(f) *Heighington v. Grant*, (1840)

5 My. & Cr. 258, 262.

(g) *Kirkman v. Booth*, (1848) 11
Beav. 273; *Matthison v. Clarke*,
(1855) 3 Drew, 3.

(h) *Matthison v. Clarke*, *ubi sup.*

(i) *Re Barber*, *ubi sup.*, at p. 81.

the following rules apply to a solicitor-executor, and also to a solicitor-administrator.

The general rule is he cannot make any profit as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. If there is business which a layman cannot properly perform he may employ a solicitor to do that legal business; but if he chooses to do the work himself he cannot make a charge against the estate. This is the rule as regards work done out of Court by a trustee, whether acting for himself or for the other trustee as well (j).

The same rule applies where the solicitor does business in Court for himself as solicitor, where he is plaintiff in an action and also where he is the defendant (k), but subject to the one exception established by *Cradock v. Piper* (l), that where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense. This exception is limited to the costs incurred in respect of business done in an action or a suit; but it is immaterial whether the costs are incurred in a hostile action, or in friendly proceedings in chambers, such as an application for maintenance of an infant (m).

Only exception to general rule.

An executor or administrator who acts as solicitor in a cause in which he is a party in his representative character, though he is only allowed personally, as against the estate, such costs as he actually pays, yet when he employs a town agent he is entitled to be allowed, as against the estate, that proportion of the whole costs which his town agent in the cause is entitled to receive (n).

Solicitor employing town agent.

The solicitor-trustee who acts as solicitor for *cestui que trust* in an action is not deprived of his proper bill of costs by

Effect of acting for *cestui que trust* in action.

(j) *Re Corsellis*, (1887) 34 C. D. 675, 681, per Cotton, L.J.

(k) *Re Barber*, *ubi sup.*, at p. 81.

(l) (1849) 1 Mac. & G. 664.

(m) *Re Corsellis*, *ubi sup.*

(n) *Burge v. Brutton*, (1843) 2 Hare, 373.

reason of his also being a trustee, because that is not part of the business of the trust property so-called (o). But it is wrong for a trustee who is a solicitor to act in proceedings for a person who occupies an adverse position, for instance a receiver appointed in the administration proceedings, not on the ground that he is making a profit by his trusteeship, but because he is putting himself into a position adverse to the estate of which he is a trustee, a position inconsistent with the due discharge of his duty to the estate, which is to get everything he can from the receiver, and to obtain the disallowance of any payments by the receiver to which he is not legally entitled, and in such a case he and his firm on taxation ought to be disallowed any profit costs in so acting (p).

Profit made by solicitor or his firm in contravention of rules to be accounted for to the estate.

Where a trustee makes profits in contravention of the above rules he must account for such profits to the estate. For instance a solicitor-trustee, and the firm of which he is a member, making profit costs in preparing leases and agreements for leases of portions of the trust estate, must account to the estate for such costs, although paid by the lessees (q).

So where a solicitor-trustee not being solicitor on the record for any party, received a commission from a London firm on business introduced by him connected with the trust, it was held that he was accountable to the trust estate for such profit, as having been made either directly or indirectly through his office of trustee (r).

Solicitor-trustee, steward of manor not liable to account.

But where the partner of a solicitor-trustee was appointed steward of a manor which formed part of the trust estate, and fees for manorial business were paid to the steward by the tenants and brought into the partnership account, it was held that such fees, not being received by the steward in his character as solicitor, were not liable to be accounted for to the trust estate (s).

What are "usual professional charges" under authority to charge in Will.

A direction in a Will that a solicitor-executor should make "the usual professional charges" does not entitle him to

(o) *Re Barber*, *ubi sup.* at p. 81.

(p) *Re Corsellis*, *ubi sup.*

(q) *Ibid.*

(r) *Vipont v. Butler*, (1893) W. N. 64.

(s) *Re Corsellis*, *ubi sup.*

charge items which are not of a strictly professional character, and could have been transacted by a lay executor without the assistance of a solicitor (*t*), although as against a client who was not a trustee he might have charged for such work (*u*). The Will, however, may authorise charges for business not strictly professional which might have been performed in person by a trustee not being a solicitor, and in that case such items will be allowed (*x*).

The Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), s. 1 (5), provides that "There may be paid to a judicial trustee out of the trust property such remuneration not exceeding the prescribed limits, as the Court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

Effect of the
Judicial
Trustee Act,
1896.

This Act applies to the case of an executor or administrator who is a judicial trustee (*y*).

Apart, however, from this Act the Court has in some cases allowed a personal representative to be remunerated, *e.g.*, where the trustee had during the life of the testator the principal and confidential management of his estate, and it was for the benefit of the estate he should continue a trustee (*z*). So when the firm of which the executor was a partner had been consignees, employed by the testator, of his West India estates, and they were continued as consignees and allowed to charge (*a*). But as a general rule commissions or remittances from the East and West Indies were allowed to be retained only so long as the trustee was actually there discharging his duty, and not after his return to this country (*b*).

Apart from
this Act
Court has
sometimes
allowed
remuneration.

When an executor or administrator is justified in employing

Proper pay-
ments to
agents will
be allowed.

(*t*) *Re Chapple*, (1884) 27 C. D. 584.

[1898] 2 Ch. 352.

(*u*) *Re Chalinder & Herrington*, [1907] 1 Ch. 58.

(*z*) *Marshall v. Holloway*, (1818) 2 Swan. 432, 453.

(*x*) *Re Fish*, [1893] 2 Ch. 413.

(*a*) *Morison v. Morison*, (1838) 4 My. & Cr. 215.

(*y*) See s. 4 (10) and *Re Ratcliff*,

(*b*) *Williams* (10th ed.) 1504.

Instances of
proper
employment
of agents.

an agent he will be allowed all proper payments made to the agent for his trouble, and it follows that where he is not justified in employing an agent he will not be allowed any payment to the agent which he ought to have done himself (*c*). For instance he is entitled to employ and pay an agent for collecting weekly rents, notwithstanding by the Will he is given a recompense for his trouble in the execution of his office (*d*), or to get in debts (*e*), or a stockbroker to identify a legatee at the bank on a transfer of stock (*f*). So also it is not absolutely necessary for an executor or administrator to go to the bank to transfer stock, but he would not be entitled to charge for power of attorney if he could, without inconvenience and expense, personally attend (*g*). So also if the nature of the accounts justify it he may employ and pay an accountant (*h*).

So also he may employ a solicitor, but he may not employ a solicitor and charge the estate for doing those ordinary things which he ought to do himself, as, for instance, writing an ordinary letter (*i*); and the amount paid by him on the solicitor's bill, without being first taxed, may be questioned by the beneficiary and moderated by the Master as against the personal representative by a deduction from charges (*k*). Moreover the beneficiary as a party interested may, under s. 39 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), either before payment or within twelve calendar months after payment, apply for an order to have the bill taxed as against the solicitor. Further, the amount of costs allowed by a Taxing Master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate, since costs which an executor or administrator may be bound

(*c*) *Weiss v. Dill*, (1834) 3 My. & K. 26.

(*d*) *Wilkinson v. Wilkinson*, (1825) 2 S. & S. 237.

(*e*) *Hopkinson v. Roe*, (1838) 1 Beav. 180.

(*f*) *Jones v. Powell*, (1843) 6 Beav. 488; *Davenport v. Powell*, (1844) 14 Sim. 275.

(*g*) *Harbin v. Darby*, (1860) 28 Beav. 325.

(*h*) *Henderson v. McIver*, (1818) 3 Madd. 275.

(*i*) *Harbin v. Darby*, *ubi sup.*

(*k*) *Johnson v. Telford*, (1827) 3 Russ. 477; *Allen v. Jarvis*, (1869) L. R. 4 Ch. 616, and see *Re Park*, (1869) 41 C. D. 326.

to pay to his own solicitor may be very improper costs as against the trust estate (*l*).

If an executor or administrator out of his own money pays debts of the deceased which carry interest, or satisfies creditors who are pressing and threaten proceedings, he is entitled not only to priority for sums so paid but also to be allowed interest thereon (*m*). But where interest is allowed it should be calculated from the time of a balance being struck on the general report or certificate, for until that time, it cannot be ascertained that he has not money in his hands (*n*).

When executor or administrator may charge interest on payments made out of his own money.

Interest will not be allowed on a sum paid by the executors or administrators out of their own moneys for costs which they have been compelled to pay (*o*).

It is the threefold duty of a trustee to keep accounts, to deliver accounts, and to vouch accounts after delivery. The duty of a trustee to keep accounts is an essential duty; he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid. As to the duty of delivering accounts, different considerations apply. In the case of very long accounts the trustee may incur considerable expense, and he could not be called upon to deliver accounts until his expenses have been guaranteed. The duty of vouching accounts does not arise till after the accounts have been delivered (*p*).

Duty to keep, deliver and vouch accounts.

Since 1883 there is no longer any general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate. In cases where proceedings for administration are rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, the defaulting trustees may be ordered to pay all the costs, including the costs of taking and vouching the

Cost of taking accounts by the Court.

(*l*) *Brown v. Burlett*, (1888) 40 C. D. 244; and cf. *Re Longbotham & Sons*, [1904] 2 Ch. 162, and *Re Cohen*, [1905] 2 Ch. 137.

(*m*) *Small v. Wing*, (1732) 5 Bro. P. C. 66, 72.

(*n*) *Gordon v. Trail*, (1820) 8 Price,

416.

(*o*) *Gordon v. Trail*, *ubi sup.*; *Lewis v. Lewis*, (1850) 13 Beav. 82.

(*p*) *Re Watson*, [1904] 49 Sol. J. 54, per Kekewich, J.; and see *Re Bosworth*, (1889) 58 L. J. Ch. 432.

accounts; and such an order may be made in proceedings commenced by originating summons (q).

Order 55, r. 10A, provides that upon an application for administration or execution of trusts by a creditor or beneficiary under a Will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Court or a judge may, in addition to the powers already existing, order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings. The plaintiff, however, has an absolute right to examine the accounts, to contest any items of them, and to surcharge any item which may be omitted in the accounts, but under this rule the Court may treat the accounts which have been brought in as being a statement of account, and give the parties liberty to contest it at their own risk as to costs (r).

The Public Trustee Act, 1906, s. 18, makes provision for the investigation and audit of trust accounts by the Public Trustee, or some person appointed by him, at the instance of any trustee or beneficiary, without any application to the Court (s).

An executor or administrator may be charged, not only for his actual receipts, but also for money which but for his wilful default he might have received.

Where a plaintiff has obtained a common administration judgment against an executor or administrator, he cannot maintain a subsequent action against the same defendant in which he charges him with wilful default in the administration of the same estate, unless he has obtained the leave of the Court to bring such action (t).

Where allegations of wilful default are made the Court ought as a general rule to dispose of them at the hearing,

(q) *Re Skinner*, [1904] 1 Ch. 289.

(r) *Re Fish*, [1893] 2 Ch. 413, 427.

(s) See Appendix.

(t) *Laming v. Gee*, (1878) 10 C. D. 715.

Money which but for his wilful default he might have received.

After common administration judgment plaintiff cannot maintain subsequent action charging wilful default without leave of the Court.

although it has a discretion to allow the inquiry to stand over in such manner as may appear reasonable (u).

If wilful default is charged in the pleadings, but the judgment at the trial gives no relief on that footing (the claim to such relief not being, however, dismissed), the Court can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries on that footing (r). And it would seem that, although the pleadings do not contain a charge of that kind, yet if some facts in taking the accounts emerge for the first time which show that the executor or administrator has committed wilful default, the Court will, without putting the parties to the expense of a supplemental action, give leave for an inquiry upon that footing to be made, which is in the nature of supplemental relief—that is, granted upon the ground which induced the Court generally to give leave to file a supplemental bill—because of new facts having been discovered since the decree was made (x).

As to when further accounts and inquiries may be directed on the footing of wilful default.

Where the account directed by the order is what is known as a "common account," the trustee is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received. Consequently if an investment is made in improper securities, not authorised by the terms of the Will or the general law, the trustee is not allowed to discharge himself on account of that investment, and he is charged in respect of it on the common account. To this extent a breach of trust can be dealt with on originating summons, notwithstanding the rule that in any contested case an originating summons is not the proper mode of deciding the question (y).

On taking common account, money wrongly invested may be disallowed.

The liability of trustees, including in that expression executors and administrators, for breaches of trust is joint and several, and until the persons enforcing such liability have

The liability of executors or administrators is joint and several.

(u) *Smith v. Armitage*, (1883) 24 C. D. 727.

Robinson, (1885) 29 C. D. 170, 175.

(r) *Re Symons*, (1882) 21 C. D. 757; but see *Re Wrightson*, [1908] 1 Ch. 789.

(y) *Re Stuart*, (1896) 74 L. T. 546;

Re Newland, (1904) W. N. 181; *Williams* (10th ed.) 1511.

(x) *Per Kay, J.*, in *Edmonds v.*

Compromise
of claim
against one
will not
discharge the
other.

Order for
payment into
Court.

been paid in full they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment in respect of his several liability, and whether in or towards satisfaction of that liability. Therefore where the executors of the deceased trustee and two surviving trustees were jointly and severally liable to make good a breach of trust, and the Court sanctioned a compromise with one of the surviving trustees, from whom a sum was in consequence received in full settlement and discharge of his liability to the plaintiffs in the action, it was held that the plaintiffs were entitled to prove against the insolvent estate of the deceased trustee for the full amount of the sum certified to be due from the trustees, and to receive dividends on such proof until by means thereof and payment by the other trustees that amount had been wholly satisfied (*s*).

In administration proceedings when a sum of money or a balance is found due from an accounting party he may be ordered to pay it into Court (*a*).

Order 55, r. 8 (d), enables the Court on originating summons to order payment into Court of any money in the hands of executors or administrators or trustees. But this rule applies only to money actually in the hands of the executor or administrator or trustee. It is not sufficient that it may have been in his hands, and that he is responsible for it. It follows that it does not apply to money which may or may not be found due from him on the result of an investigation (*b*).

The present practice is not to order payment of money into Court by a defendant upon interlocutory motion on the ground of admissions made by him, unless it is made out to the satisfaction of the Court that the defendant has the sum claimed in his hands, and that he has no real defence to the plaintiff's demand (*c*).

If the defendant had sold stock, and before any question

(-) *Edwards v. Hood-Barra*, [1905] 408.

1 Ch. 20.

(a) See *Dan. Ch. P.* (7th ed.) p. 863.

(b) *Nutter v. Holland*, [1894] 3 Ch.

(c) *Neville v. Matthewman*, [1894] 3 Ch. 345.

arose disposed of the purchase money, in answer to an interlocutory motion for payment into Court of the purchase money, he must depose to the fact that the purchase money is no longer under his control (*d*). But it would seem that he cannot escape liability to pay into Court by merely stating that he has paid the money away to someone to whom he had no right to pay it and who had no title to receive it (*e*).

Where a trustee or person acting in a fiduciary capacity is ordered to pay into Court, by a Court of Equity, any sum in his possession or under his control, and he makes default, leave to issue a writ of attachment against him for his contempt may be granted (*f*); but it must be proved on the application that the money ordered to be paid into Court is or has been in the actual possession or control of the person sought to be committed; mere constructive receipt by an agent or solicitor on his behalf, who may never have accounted, is not enough (*g*).

Attachment
in default.

Where the plaintiff in an action against an executor or administrator or trustee for recovery of a sum of money due from him on a misapplication of trust funds takes an ordinary judgment against him for recovery of the sum in question, the judgment cannot be supplemented by an order for payment within a limited time, so as to found a right to issue a writ of attachment against the defendant in default of payment within the stipulated time (*h*).

In the case of a married woman being executrix or administratrix or trustee, an order may be made upon her for payment of money into Court, and if the order is for the better securing the fund, and not to make good a devastavit committed by her, the order may be enforced by writ of attachment; but if the object of the order is to compel the married woman to make good a loss occasioned by her devastavit, the order should be made in the form prescribed in *Scott v. Morley* (*i*),

(*d*) *Re Benson*, [1899] 1 Ch. 39.

(*e*) *Crompton and Evans' Union Bank v. Burton*, [1895] 2 Ch. 711.

(*f*) Ord. 42, r. 4, and see Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4; Debtors Act, 1878 (41 & 42 Vict.

c. 54).

(*g*) *Re Fewster*, [1901] 1 Ch. 447; *Re Wilkins*, (1901) W. N. 202.

(*h*) *Re Oddy*, [1906] 1 Ch. 93.

(*i*) (1887) 20 Q. B. D. 120.

under which she would not be liable to attachment for non-compliance with it (*k*).

There is no absolute rule that beneficiaries entitled to a trust fund in the hands of trustees have the right to have it brought into Court. If proper trustees are kept up and the fund is not in jeopardy the leaning of the Court is not to interfere (*l*).

(*k*) *Re Turnbull*, [1900] 1 Ch. 180. (*l*) *Re Braithwaite*, (1883) 21 C. D. 121.

CANADIAN NOTES.

It is not only the duty of an executor or administrator to file an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege, in case of his death, extends to his personal representative, though not at the same time the representative of the original testator, and even though there is a surviving representative of the original testator. Where, therefore, the executors of an executor brought into the proper Surrogate Court an account of the dealings of their testator with the assets of the estate of the original testator, treating in the account as cash received by the accounting executor the amount of a certain promissory note, and the account was audited and approved after due notice to the surviving executor of the original testator, it was held in an issue in the High Court between the surviving executor of the original testator and the executors of the deceased executor, upon pleadings so framed as to raise not only the question of the property in this note but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor, that the proceeds of the note were payable to the estate of his deceased co-executor. *Cunnington v. Cunningham* (1901), 2 O.L.R. 511.

Binding
adjudication.

Section 72 of the Surrogate Courts Act, R.S.O. 1897, c. 59, has been the subject of judicial construction. The section provides that "where an executor or administrator has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval, except in

so far as fraud or mistake is shewn, shall be binding on any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under such person."

Where the defendant, an executor, brought into the proper Surrogate Court the accounts of certain estates of which he was the executor, which were passed by the Judge, in the presence of the solicitor for the plaintiff, a beneficiary, and subsequently the plaintiff brought an action in the High Court, and without any pleadings being delivered, an order was made, by consent, for the removal of the executor and the appointment of a trust company in his place, and for the passing of the accounts, adopting the common form of the order for such purpose, it was held that on the taking of the accounts in the Master's office the account taken and passed by the Surrogate Court Judge was under section 72 no mistake or fraud having been shewn, binding on the plaintiff, for notwithstanding such consent the judgment must be construed as if made *in invitum*, and the usual rules of law and procedure, statutory and otherwise, applied thereto. *Gibson v. Gardner* (1906), 13 O.L.R. 521.

Binding
effect of
approval.

In a later case, on an appeal from the judgment of the Judge of the Surrogate Court of York, approving of certain accounts brought before him under the provisions of this section, as amended by 2 Edw. VII. c. 12, s. 11, and 5 Edw. VII. c. 14, s. 1, Meredith, C.J., in delivering the judgment of the Court said: "It is only so far as mistake or fraud is shewn, that the binding effect of the approval is taken away, and the language of the section plainly indicates that it was not intended that the whole account should be opened up, but that the account should be opened up so as to remove from it anything which, owing to fraud or mistake, had not been charged or had been allowed to the executor, administrator or guardian. . . . The principle applicable to the opening of an ordinary stated account, and the consequences of such an account being opened, do not, I think, apply to an account taken by the Court in the presence of the parties, where the

persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account. *In re Wilson and Toronto General Trusts Corporation* (1908), 15 O.L.R. at p. 616. See *Re Daly*, 39 S.C.R. 122.

Under a direction that the timber, on land devised on trust to rent and pay the surplus rents to a widow *durante viduitate* for herself and the testator's children, remainder to the children, should not be used except for specific purposes, the executors are responsible for the care of the timber. *Stewart v. Fletcher* (1871), 18 Gr. 21. Care of timber.

An executor who is a minor is not liable to account. *Nash v. McKay* (1868), 1 Gr. 247. An infant whether executor or executor *de son tort* is not liable for *devastavit*. *Young v. Purves* (1883), 11 O.R. 597.

On a devise to a trustee on trust to cultivate, demise, let and manage for the testator's daughters without impeachment of waste, it was held that the trustee was not exonerated from liability for waste, but was empowered to do such acts as he could do if he were a tenant not accountable for waste, that he was not bound to operate a mill on the property, and, if he did not get a tenant for it, that he was not accountable for its unproductiveness, nor was he responsible for selling uncut grass at auction instead of making hay of it. *Vernon v. Seaman*, R.E.D. 190. Liability on waste.

Where executors are given discretionary powers, either of conversion or maintenance, the Court, in the absence of improper conduct will not interfere with or control the exercise of their discretion. *Foreman v. McGill* (1872), 19 Gr. 210; *Cowan v. Besserer* (1883), 5 O.R. 624; *Re Parker* (1873), 20 Gr. 389; *Rowsell v. Winstanley* (1859), 7 Gr. 141; *Re Curry* (1876), 23 Gr. 277. Discretionary powers.

A devise upon trust to convert and invest the proceeds and apply the *corpus* and income in a specified manner is imperative, and one which the Court will enforce, notwithstanding a subsequent clause in the will giving the executors "full Imperative devise.

discretionary power as to the mode, time, conditions of sale, amount to be paid down, etc. *Lewis v. Moore* (1897), 24 A.R. 393.

Chattels.

Where a will creates a life estate in chattels the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life and not the executor then becomes liable for them to the person entitled in remainder. *In re Munsie* (1884), 10 P.R. 98.

Executors cannot postpone payments by selling land upon credit. *Smith v. Seaton* (1870), 17 Gr. 397.

**Medical
and
funeral
expenses.**

A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate." The father and mother died, and during their last illness certain expenses were incurred for medical attendance, nurses, etc., and after their death for funeral expenses, etc. It was held that the expenditures were covered by the provision for maintenance and an order was made for their payment out of the testator's estate. *Howe v. Carlow* (1888), 15 O.R. 677.

**Expenses
of
defending
suit.**

Where a person died intestate leaving as heirs a sister and two nephews and upon passing accounts of his estate a sum of \$1,000 was found to be in the hands of his administrators and was directed to be left there until the final winding up of the estate, it was held that the payment of that amount or any part of it to defend a suit to set aside a trust deed of the sister after her death could not be allowed. *Re Anning* (1897), 34 N.B.R. 308.

As to the right of a beneficiary under a will, where a testator had appointed two of his partners as executors and where assets of the estate had been employed in the business, to an account of profits of the business. See *Carvell v. Aitken* (1908), 5 E.L.R. 477.

CHAPTER XLV.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR HIS TORTIOUS ACTS.

WHERE an executor or administrator accepts that office he accepts the duties of the office, and he becomes a trustee in the sense that he is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (*a*).

Personal representative liable for all breaches of ordinary trusts arising from his office.

An executor or administrator is therefore guilty of a *devastavit* not merely should he misappropriate the assets to his own purposes, but also if he misapplies the assets as by paying excessive sums for funeral expenses (*b*), or by paying debts of inferior degree with notice of debts of superior degree (*c*), or by making payments to beneficiaries before discharging the debts (*d*), or by needlessly and without authority carrying on the business of the deceased (*e*), or by applying the assets in payment of a claim which he was not bound to satisfy (*f*).

Instances.

So also such acts of negligence or careless administration, as defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a *devastavit* (*g*), as if by his delay in taking proceedings a debtor of the deceased is enabled to plead the Statute of Limitations (*h*), or the debt is lost owing to bankruptcy of the debtor (*i*), or by his inability to pay (*k*), when but for such neglect it might have been recovered (*l*), or

(*a*) Williams (10th ed.) 1434; and see *Re Marsden*, (1884) 26 C. D. 783, 789, per Kay, J.

(*b*) *Ante*, p. 307.

(*c*) *Ante*, p. 318.

(*d*) *Re Marsden*, *ubi sup.*

(*e*) *Ante*, p. 382.

(*f*) Williams (10th ed.) 1438; and see *Midgley v. Midgley*, [1893] 3 Ch. 282, and *ante*, pp. 224, 328.

(*g*) Williams (10th ed.) 1441.

(*h*) *Hayward v. Kinsey*, (1702) 12 Mod. 573.

(*i*) *Powell v. Evans*, (1801) 5 Ves. 839; *Att.-Gen. v. Higham*, (1843) 2 Y. & Coll. C. C. 634.

(*k*) *Stiles v. Guy*, (1848) 16 Sim. 230; *Re Brogden*, (1886) 38 C. D. 546.

(*l*) *East v. East*, (1846) 5 Hare, 348, 349; *Stiles v. Guy*, *ubi sup.*

if he neglects to realise the assets at a proper time whereby loss is occasioned (*m*), or by allowing beneficiaries to enjoy in specie wasting property instead of realising it (*n*), or if he allow debts bearing interest to run on when he had assets in hand sufficient to discharge them (*o*), or if having got possession of goods he subsequently by want of reasonable care allows them to be lost or destroyed (*p*), or if he neglects to invest considerable balances in his hands not wanted for the exigency of the deceased's affairs (*q*), or if he unnecessarily allows money to be in the hands of agents (*r*).

When devastavit of one executor shall not charge others.

Speaking generally, a devastavit by one of two executors or administrators will not charge his companion, provided he has not intentionally or otherwise contributed to it (*s*). Hence, an executor will not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor; also, the circumstance that one of two executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, will not affect the latter so as to make him guilty of a devastavit by paying an inferior debt; though perhaps, if notice to one executor be proved, and nothing more appears, it may be presumed that he communicated it to his co-executor (*t*).

When devastavit by one executor will charge others.

But if one executor unnecessarily does an act which enables his co-executor to obtain sole possession of money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and this money is afterwards misapplied, the executor who thus enables his co-executor to obtain possession of the money is liable to make good the loss (*u*).

(*m*) *Taylor v. Tabrum*, (1833) 6 Sim. 281.

(*n*) *Wightwick v. Lord*, (1857) 6 H. L. C. 217.

(*o*) *Bate v. Robins*, (1862) 32 Beav. 73.

(*p*) *Job v. Job*, (1877) 6 C. D. 562; and see *Johnson v. Palmer*, [1893] 1 Ch. 71.

(*q*) *Jebbs v. Carpenter*, (1816) 1

Mad. 290.

(*r*) *Johnson v. Newton*, (1853) 11 Hare, 160, 168; *Speight v. Gaunt*, (1883) 22 C. D. 727; 9 App. Cas. 1.

(*s*) *Styles v. Guy*, (1848) 1 Mac. & G. 422, 435.

(*t*) See *Williams* (10th ed.) 1467.

(*u*) *Candler v. Tillett*, (1855) 22 Beav. 257, 263; *Re Gasquoine*, [1894] 1 Ch. 470.

Such an act is not unnecessary if it is done in the regular course of business (x).

If an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, he is not responsible (y).

It is, however, the duty of all executors to watch over, and, if necessary, to correct, the conduct of each other, and an executor who stands by and sees a breach of trust committed by his co-executor becomes responsible for that breach of trust (z).

The standard of a trustee's duty is thus stated by Lord Blackburn in *Speight v. Gaunt* (a) :—

Standard of duty as stated in *Speight v. Gaunt* and *Re Whiteley*.

"As a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own, but he must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money, and allowing money to remain on deposit with an agent till an investment is found is unjustifiable."

And in *Re Whiteley* (b) Lindley, L.J., explained the law as follows :—"The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in, and unless this is borne in mind the standard of a trustee's duty will be fixed too low, lower than it has ever yet been fixed, and lower certainly than the House of Lords or this Court endeavoured to fix it in *Speight v. Gaunt*."

(x) *Clough v. Bond*, (1837) 3 My. & Cr. 490, 497; *Re Gascoigne*, *ubi sup.*

(y) *Langford v. Gascoyne*, (1805) 11 Ves. 333, 335; *Terrell v. Matthews*, (1841) 1 M. & G. 433, n. (a).

(z) *Styles v. Guy*, (1848) 1 Mac. & G.

422, 433; *Williams v. Nixon*, (1840) 2 Beav. 472, 475; *Horton v. Brocklehurst*, (1858) 29 Beav. 504.

(a) 9 App. Cas. 1, 19.

(b) (1886) 33 C. D. 347, 355.

Duty as to
choice of in-
vestment.

Trustees are not justified in investing trust funds in any property where active and exceptional vigilance and diligence is requisite on their part to anticipate and prevent a loss to their *cestuis que trust* (c).

Not liable for
mere errors of
judgment.

But trustees acting honestly with ordinary prudence and within the limits of their trust are not liable for mere errors of judgment. For instance, an honest trustee is not liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties (d).

So also where a testator left money invested in speculative securities, and after the twelve months from the death the executors in the honest exercise of their discretion thought it more prudent to wait for a rise, it was held that they ought not to be made personally responsible for the loss arising from not having sold within the twelve months (e).

Liability not
increased by
receipt of re-
muneration.

Moreover, the liability of a trustee is not increased by the fact of his being remunerated for his services (f).

Not liable for
felonious acts
of servants.

A trustee, although remunerated for his services, is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence (g).

Entitled to
indemnity
against lia-
bility for acts
of agents.

So a trustee who employs a proper agent to do an act within the due discharge of his duty is entitled to be indemnified out of the trust estate against any legal liability which the trustee may incur to a third party by reason of the mistake or negligent act of such agent (h).

Must use
prudence in
acting on
advice.

Although trustees may and must seek advice on matters they do not themselves understand, yet in acting on advice

(c) *Re Whiteley*, *ubi sup.*, per Lopes, L.J., at p. 359. As to what are trust investments authorised by statute see the Trustee Act, 1893 (56 & 57 Vict. c. 53), Part I., ss. 1—9.

(d) *Re Chapman*, [1896] 2 Ch. 763, 776, per Lindley, L.J.

(e) *Marsden v. Kent*, (1877) 5

C. D. 598.

(f) *Jobson v. Palmer*, [1893] 1 Ch. 71; *Shepherd v. Harris*, [1905] 2 Ch. 310, 318.

(g) *Jobson v. Palmer*, *ubi sup.*

(h) *Benett v. Wyndham*, (1862) 4 De G. F. & J. 259.

given to them they must act with the prudence already referred to (i).

Although a trustee cannot delegate his trust, yet he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. The law is stated as follows by Lord Selborne in *Speight v. Gaunt* (k) :—

Employment
of agents.

"In the early case of *Ex parte Belchier* (l), before Lord Hardwicke, it was determined that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed, and, in conformity with it, the stat. 22 & 23 Vict. c. 35, s. 31, enacts that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability for any banker, broker, or other person with whom any trust moneys or securities may be deposited."

"Neither the statute, however, nor the doctrine of *Ex parte Belchier* (m) authorises a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which (to use Lord Hardwicke's words) there is no "moral necessity from the usage of mankind" for the employment of

(i) *Ante*, p. 573; *Re Whiteley*, (1886) 33 C. D. 347, 350, 356; S. C. *Learoyd v. Whiteley*, (1888) 12 App. Cas. 737, 731; and see *Re Somerset*,

[1894] 1 Ch. 231, 273.

(k) *Ubi sup.* at p. 4.

(l) (1754) Amb. 218.

(m) *Ubi sup.*

such an agency. The cases of *Rowland v. Witherden* (n), *Floyer v. Bostock* (o), and many others, show that trustees bound to invest trust moneys in authorised securities, are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse."

The rule laid down in *Speight v. Gaunt* applies to a case where a co-trustee is employed and paid as broker under a clause in the Will creating the trust (p).

An obvious limitation of the rule stated in *Speight v. Gaunt* is that the agent must not be employed out of the ordinary scope of his business. If a trustee employs an agent to do that which is not the ordinary business of such an agent, and he performs that unusual duty improperly, and loss is thereby occasioned, the trustee would not be exonerated. For instance, it is not part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest trust money on mortgage. The trustees must exercise their own judgment in such a case (q). So in *Speight v. Gaunt*, if the trustee had exercised no discretion as to the choice of a broker, but had left that to his solicitors who had employed a man known to them to be untrustworthy, the trustee would not have been exonerated (r).

Effect of
allowing
money on the
sale of trust
property to
pass into the
hands of
solicitors.

Except so far as is authorised by the statutes next mentioned, trustees who in selling trust property, or changing an investment, allow the trust fund to pass into the hands of their solicitors, and it is lost in consequence, will be liable (s).

Sect. 56 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that:—

(1) "Where a solicitor produces a deed, having in the

(n) (1852) 3 Mac. & G. 568, 574.

268.

(o) (1865) 35 Beav. 603, 606.

(r) Per Kay, J., in *Fry v. Tapson*,

(p) *Shepherd v. Harris*, [1905] 2 Ch. 310.

ubi sup.

(s) *Ibid.*

(q) *Fry v. Tapson*, (1884) 28 C. D.

body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

And s. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 58), which by s. 50 applies to an executor or administrator, provides as follows:—

(1) "A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce a deed containing any such receipt as is referred to in s. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee."

Solicitor appointed agent on production of deed containing receipt to receive the consideration.

(2) "A trustee may appoint a banker or solicitor to be his agent to receive or give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or the solicitor to have the custody of, and to produce, the policy of assurance, with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment."

Banker or solicitor appointed agent to receive money payable under a policy of assurance.

(3) "Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably

Banker or solicitor not to retain control longer than reasonably necessary.

necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee."

(5) "Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

Effect of
Trustee Act,
1893, s. 24,
making him
accountable
for his own
wilful default
only.

The Trustee Act, 1893, s. 24 (re-enacting 22 & 23 Vict. c. 85, s. 31), provides that "A trustee [which by s. 50 includes the personal representative of a deceased person] shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default, and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

This statute does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law and throws the *onus probandi* on those who seek to charge an executor or administrator, or trustee, with a loss arising from the default of an agent, when the propriety of employing an agent has been established (t).

Effect of
Trustee Act,
1893, s. 45, as
to impound-
ing by way of
indemnity
the interest
of a bene-
ficiary.

The Trustee Act, 1893, s. 45 (1) (substituted for s. 6 of the Trustee Act, 1888), provides that "Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary

(t) *Re Brier*, (1884) 26 C. D. 233, 243, per *Ld. Selborne*.

i the trust estate by way of indemnity to the trustee or person claiming through him."

The words "in writing" in this section apply only to "consent" and not to "instigation" or "request" (u).

What amounts to instigating or requesting or consenting.

In order to make a beneficiary liable under this section in respect of an improper investment, it must be shown not only that he instigated, requested or consented in writing to the investment, but that he knew the facts which would make it a breach of trust. If a *cestui que trust* merely instigates, requests, or consents in writing to an investment which is authorized by the terms of the power, he has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him, unless they can show that he instigated, requested or consented in writing to their non-performance of their duty in this respect. In order to bring the case within the section the beneficiary must have instigated, requested, or consented in writing to the trustee departing from and going outside the terms of the trust (x).

The discretionary power conferred upon the Court by this section ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust (y).

It is the duty of a trustee to protect a married woman restrained from anticipation against herself when she asks him to commit a breach of trust, and if he knowingly commits a breach of trust at her request the Court will be slow to remove the restraint in order that her life interest may be impounded to recoup him (z).

Circumstances under which Court will remove restraint on anticipation in such cases.

If a beneficiary claiming under a trust does not instigate or request a breach of trust—is not the active moving party towards it, but merely consents to it—and he obtains no personal benefit from it, then his interest in the trust estate

Merely consenting without instigating or requesting or obtaining any personal benefit.

(*) Griffith v. Hughes, [1892] 3 Ch. 105; *Re Somerset*, [1894] 1 Ch. 231, 265.

(y) Griffith v. Hughes, *ubi sup.*

(z) Bolton v. Curre, [1895] 1 Ch. 544.

(w) *Re Somerset*, *ubi sup.*

would not be impoundable in order to indemnify the trustee liable to make good loss occasioned by the breach (a).

Apart from Act beneficiary may be debarred from claiming relief.

The sections of the above Acts clearly extended the power of the Court so far as concerns the case of a married woman restrained from anticipation, and also by giving power to the Court to impound any part of the interest in the trust property of any beneficiary who consented to a breach of trust, provided that consent was in writing, but there is nothing in those sections which operates to deprive the trustee of his right independently of the Acts, namely, the right of saying as against a beneficiary of full contracting age and capacity, who knowingly consents to a breach of trust, that he is not entitled to relief against the trustee for any loss occasioned to that beneficiary's interest in the trust estate by reason of the breach of trust even though he has derived no benefit thereby, and for this purpose, the consent and the breach of trust if proved, need not be in writing (b).

Trustee, being *cestui que trust*, cannot claim contribution.

So a *cestui que trust*, being also a trustee, who concurs in a breach of trust, is not entitled to relief against his co-trustee in respect of it; for although where co-trustees, plaintiff and defendant, are in *pari delicto*, the plaintiff is entitled to contribution from the defendant to the extent of one half the loss, yet where the plaintiff is also *cestui que trust*, the defendant is entitled to be indemnified out of the share of the plaintiff against the consequences of the breach of trust committed at his request and for his benefit (c). Moreover this doctrine applies to a person who becomes a *cestui que trust* after his concurrence (d).

Effect of Trustee Act, 1888, s. 8, entitling trustees to benefit of Statute of Limitations.

An executor or administrator is, under s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59) (dd), entitled to the benefit of any Statute of Limitations, or, where no existing Statute of Limitations applies, to plead lapse of time as a bar to any action or other proceeding in like manner as if the claim had

(a) *Fletcher v. Collis*, [1905] 2 Ch. 24, 32.

(b) *Ibid.*

(c) *Chillingworth v. Chambers*,

[1896] 1 Ch. 685.

(d) *Evans v. Benyon*, (1887) 37 C. D. 329.

(dd) See *ante*, p. 404.

been against him in an action of debt, and the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession. The benefit of this Act, however, does not apply where the claim against the executor or administrator is founded upon any fraud or fraudulent breach of trust to which he was a party or privy, or is to recover trust property, or the proceeds thereof still retained by him or previously received by him and converted to his use.

The Act may be pleaded as a bar notwithstanding any fraud or fraudulent breach of trust by an agent employed by the executor or administrator, provided the latter was not "party or privy" to the fraud (e).

Trust moneys not being in the hands or under the control of trustees when the action was brought, are not "still retained" by them within the meaning of the Act (f).

The effect of s. 8 of the Trustee Act, 1888, is that any action or proceeding to recover money or other property from trustees (being one to which no Statute of Limitations existing at the passing of the Act applies) is to be brought within six years from the time when the right of recovery accrued, *e.g.*, in the case of an innocent breach of trust by investing trust money upon mortgage of property of insufficient value—from the time when the investment was made (g).

The Judicial Trustees Act, 1896 (59 & 60 Vict. c. 85), s. 8 (1), provides that: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the

Effect of the
Judicial
Trustees Act,
1896, s. 8,
enabling
Court to
relieve where
trustee has
acted
honestly and
reasonably.

(e) *Thorne v. Heard & Marsh*,
[1895] A. C. 496.

(f) *Ibid.*

(g) *Re Somerset*, [1894] 1 Ch. 231.

Court may relieve the trustee either wholly or partly from personal liability for the same."

In order to grant relief under this section the Court has to find as a fact that the trustee has acted honestly and reasonably and ought fairly to be excused.

No general rules or principles can be laid down as those to be acted upon in carrying out the section, and each case must be dealt with according to its own circumstances. The section is meant to be acted upon freely and fairly in the exercise of judicial discretion, but the Court ought to be satisfied by sufficient evidence before exercising the large powers conferred upon it, that the trustees acted reasonably as well as honestly (*h*).

The burden lies on the trustee to show that he has acted reasonably (*i*).

The following are some instances where the Court has given relief:—

Instances
where Court
has given
relief.

1. Where the defendant, the executor of a solicitor, believing, and on grounds that justified that belief although erroneous, that the deceased solicitor had no right of action against the client personally for the costs incurred in certain administration proceedings, took no steps to recover such costs (*k*).

2. Where an executor who paid an immediate legacy to the widow of the testator and allowed her to receive the income of the estate, which at the time he had reason to believe was solvent, notwithstanding delay in issuing advertisements, was relieved in respect of payments made prior to the issue of writ by a creditor, although subsequent payments were held to have been made at his own risk (*l*).

3. Where executors, having reason to suppose that a debtor of the testator on a promissory note, bearing interest, was in good credit at the testator's death and able to pay, and having come to the conclusion erroneously, on the construction of an obscure Will, that it was not the intention of the testator

(A) *Re Turner*, [1897] 1 Ch. 536;
Re Roberts, [1897] 76 L. T. 479, 483;
Re Stuart, [1897] 2 Ch. 583, 590.

(i) *Re Stuart*, *ubi sup.*
(k) *Re Roberts*, *ubi sup.*
(l) *Re Kay*, [1897] 2 Ch. 518.

that the promissory note should be called in, omitted to do so for nearly two years, when on the death of the debtor his estate was found insolvent and the money was to a considerable extent lost (m).

4. Where executors made payments to their solicitors from time to time for payment of debts, disbursements, and other administration purposes, in reliance on their statements that the sums were in each case required for those purposes, and, the solicitors becoming bankrupt, the balance unapplied by them and remaining in their hands was lost to the estate (n).

5. Where trustees sold leaseholds under the advice of their solicitors that they had power to sell when they had no such power, but in other respects the sale was a judicious one having regard to the interests of reversioners as well as tenant for life, whereby the plaintiff, the tenant for life, incurred loss of income (o).

6. Also where trustees, acting on the advice of solicitors, invested on mortgage without an actual valuation, but at a value calculated at a rate at which adjacent property had sold for by auction in a previous year, they were relieved except to the extent of the excess over two-thirds of the actual value (p).

But a trustee does not act reasonably so as to entitle him to be excused when he leaves everything to his co-trustee, even though the latter is a solicitor and has been nominated by the testator (n).

Instances where Court has refused relief.

And where an executrix, without consulting a solicitor, but on the advice of a commission agent who had been a friend and adviser of her deceased husband, postponed for fourteen years

(m) *Re Grindey*, [1898] 2 Ch. 593.

(n) *Re Lord De Clifford's Estate*, [1900] 2 Ch. 707.

(o) *Perrins v. Bellamy*, [1899] 1 Ch. 797.

(p) *Waite v. Parkinson*, (1901) 85 L. T. 486; but see *Re Stuart*, [1897] 2 Ch. 583, where it was held that *prima facie* the requirements of s. 4 of the

Trustee Act, 1888, and s. 8 of the Trustee Act, 1893, constitute a standard by which reasonable conduct is to be judged.

(q) *Re Turner*, [1897] 1 Ch. 536; and see *Re Second East Dulwich Building Society*, (1899) 68 L. J. Ch. 196.

the sale of some shares instead of selling them within the year after the testator's death, her conduct was held not reasonable and relief was refused (r).

Right of beneficiary to follow trust funds so long as they can be traced.

In addition to the personal liability of an executor or administrator for a devastavit, persons beneficially interested are entitled to follow trust funds. So long as the trust property can be traced and followed into other property, into which it has been converted, it remains subject to the trust and the trustee cannot assert a title of his own. And if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own (s).

Option of beneficiary in case of unauthorised purchases.

If a trustee makes an unauthorised purchase with trust funds, the beneficial owner is entitled at his election to take the property, or to have a charge on the property for the amount of the trust money. But when a trustee has mixed the money with his own, and has bought the property with the mixed fund, the beneficial owner can no longer elect to take the property, but he is still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee (t).

Effect of trustee mixing trust money with his own.

So if a person has received money in a fiduciary character and has paid it into his own account at his bankers, mixing it with his own money, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and if subsequently he, from time to time, draws out money, the rule in *Clayton's Case* (u), attributing the first drawings out to the first payments in, does not apply, but he must be taken to have drawn out his own money in preference to the trust money (x). Moreover, if out of the moneys drawn from the account he purchased an investment which remains in his own name, and subsequently dissipated

(r) *Re Baker*, (1898) 77 L. T. 712.

(s) *Pennell v. Deffell*, (1855) 4 D. M. & G. 372.

(t) *Re Hallett's Estate*, (1879) 13

C. D. 696, 709.

(u) (1816) 1 Mer. 572.

(x) *Re Hallett's Estate*, *ubi sup.*

the balance, his representatives cannot successfully maintain that the investment which remains was purchased out of the trustee's own money, and that which has been spent, and can no longer be traced and recovered, was the money belonging to the trust(y).

CANADIAN NOTES.

Where executors act honestly and reasonably, upon a mistaken construction of a will, thereby committing technical breaches of trust, they may be relieved under R.S.O. 1897, c. 129, s. 32, and 62 Vict. 2nd session c. 15. *Henning v. McLean* (1901), 2 O.L.R. 169. Technical breaches.

Where the agent of an executrix misappropriated the funds of the estate the executrix was held responsible. *Low v. Gemlcy* (1890), 18 S.C.R. 685. Misappropriation.

The defendants signed a promissory note as "executors of an estate" for the testator's debt, and were held personally liable thereon. *Union Bank of Canada v. McRae* (1901), 21 C.L.T. Occ. N. 409, 496. Personal liability.

Where executors gave under power of sale in the will of the testator a covenant for themselves, their heirs, etc., in a deed for good title they were held personally liable. *McDonald v. McDonell* (1841), 6 O.S. 109.

Where an administratrix rightfully and unavoidably carried on the business of the deceased for a time and made losses and in addition certain assets of such business excusably held unsold for a time after closing up of said business were lost by a fire, the administratrix was held not liable to make good such losses. *Re Nugent* (1905), 2 W.L.R. 3. See also *Smith v. Mason* (1901), 1 O.L.R. 594 as to relief from consequences of breach of trust where trustees have acted honestly and reasonably. Carrying on business.

(y) *Re Oatway*, [1903] 2 Ch. 356.

EXECUTORS.

Where by tacit consent of the other executors one of them an executor became the active manager of the estate, and when certain land of the estate was sold to pay off "debts or incumbrances" against the estate, misappropriated the proceeds, an executrix who joined in the conveyance to the purchaser for the sake of conformity but did not receive any of the purchase money and was not aware of the misappropriation was held not responsible to the estate for the misappropriation. *Re Crowter, Crowter v. Hinman* (1885), 10 O.R. 159. See also *Beaty v. Shaw* (1886), 13 O.R. 21, 14 A.R. 600; *Bloomfield v. Brooke* (1880), 8 P.R. 266; *Bacon v. Shier*, (1869), 16 Gr. 485; *Archer v. Severn* (1886), 13 O.R. 316.

Executors allowed bank stock which came into their hands as assets from their testator to remain undisposed of, and received the dividends. By the terms of the bank charter the stock holders were individually liable for the payment of the debts of the bank in proportion to the stock they held. The bank suspended payment, was wound up, and a call made on the executors as contributories. They were held liable in their representative capacity and it was also held that the payment of legacies under the will could not be allowed against their contingent liabilities under the charter. *Mackenzie, Curator, etc. v. King*, Mich. T. (1871), *Stevens' Digest*, N.B.R. 376.

Executors, who, under the provisions of the will, had paid out of the funds of the estate a large sum for the board and maintenance of a daughter of the deceased, although the assets of the estate were insufficient to pay the claims of creditors, were not relieved by the fact that the principal creditor was aware of the payments and made no objection, it also appearing that the principal creditor was not aware of the insufficiency of the estate. *Re Estate Edwin Ryerson*, 29 N.S.R. 81.

As to purchase by executor to the prejudice of legatee. See *Robinson v. Coyne*, 14 Gr. 561.

Executors were authorized by a will to sell such portion of the real estate as they, in their discretion, should think

Executors
as contri-
butories.

necessary to pay such debts as the personal estate would not discharge. They offered for sale at auction an unsurveyed lot described as containing sixty acres, more or less, and it was sold by the acre, and was found, on survey after the sale, to contain one hundred and seventeen acres. The amount to be paid by the purchaser, being much more than was necessary to pay the debts referred to in the will, the executors refused to execute the deed of the one hundred and seventeen acres tendered by the purchaser. In a suit by the purchaser for specific performance he was held entitled to a conveyance of the whole lot, and it also was held that the executors would not be guilty of a breach of trust in conveying that quantity. *Sea v. McLean*, 14 S.C.R. 632.

A window fell from a building and killed a pedestrian on the street. The building formed part of the estate of a testator, but it had been specifically bequeathed to G. F., and his children, for whom the executors were also trustees. The widow sued the executors and trustees as such and also personally for damages for negligence, and they were held liable personally and as trustees, but not liable as executors of the general estate. *Ferrier v. Trepannier* (1894), 24 S.C.R. 86.

Personal
liability.

Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss. *Sovereign v. Sovereign* (1869), 15 Gr. 559.

Waste.

The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage. *Higgins v. Trusts Corporation of Ontario* (1900), 27 A.R. 432.

The Trustee Limitation Act R.S.O., c. 129, s. 32, protects executors where, relying in good faith on the statement of their testator's solicitor that he has in his hands securities sufficient to answer a fund they are directed by the will to invest for an annuitant, they distribute the estate, and it is

Misappropriation by
solicitor.

terwards found that before the testator's death the solicitor has misappropriated the money given to him by the testator to invest, and had in fact at the time of the representation no securities or moneys in his hands. *Clark v. Bellamy* (1900), 27 A.R. 435.

Breach
of trust.

When one or more of several executors and trustees act in getting in and dealing with the trust funds, an inactive trustee is accountable therefore equally with the others, if, having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. *McCarter v. McCarter* (1884), 7 O.R. 243. But where two persons were appointed executors of a will which contained the usual indemnity clause exonerating each from liability for the other, and one of them took upon himself the actual management of the estate with the knowledge and consent of, but not under any express agreement with, the other, and applied a sum of money to his own use, of which fact the other was not aware, it was held that the other executor was not liable for the sum so applied. *King v. Hilton* (1881), 29 Gr. 381.

Compensation.

The fact of an executor being guilty of acts of negligence, mismanagement and breach of trust in his management of the estate, there being nothing of a dishonest or fraudulent character, while the losses resulting therefrom were capable of being compensated for and made good in money, does not deprive him of his right to compensation. *McLenaghan v. Perkins* (1903), 5 O.L.R. 129.

Where executors suffered judgment against them at law for a debt of their testator and the lands were sold upon process issued thereon, although one of the executors owed the estate a larger amount, the Court ordered both executors to make good the difference between what the lands were actually worth and the amount realized upon the sale. *McPhadden v. Bacon* (1867), 13 Gr. 591.

Executors
acting
without
authority.

Where executors without any authority assumed to manage the real estate they were made to account for their acts as if they had been duly empowered as trustees. In such case

it is their duty to keep accounts and be ready at all times to explain their dealings. *Chisholm v. Barnard*, 10 Gr. 479; *Harrison v. Patterson* (1865), 11 Gr. 105.

Delay on the part of the executors to sell lands which by the will were saleable for the payment of debts will render the executors liable for rents and profits. *Emes v. Emes* (1865), 11 Gr. 325. See *McMillan v. Millan* (1874), 21 Gr. 369, where loss occurred and the executors were held not liable, but interest was held chargeable under the special circumstances.

Liability
for delay.

Where legacies were given to executors as remuneration "for their trouble," it was held that the legacies were not payable because of irregularities on the part of the executors. *Kennedy v. Pringle* (1879), 27 Gr. 305.

Legacy
not
payable.

Executors may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands. *Sovereign v. Sovereign* (1869), 15 Gr. 559. See *Wiard v. Gable* (1860), 8 Gr. 458; cf. *Vanston v. Thompson* (1864), 10 Gr. 542.

Interest.

The principle upon which the Court acts in charging executors with interest, is not that of punishment, but of compensating the *cestui que trust*, and depriving the trustee of the advantage he has wrongfully obtained. *Ingles v. Beaty* (1878), 2 A.R. 453.

An executor will not necessarily be charged with compound interest in all cases, except those in which there is a mere neglect to invest. *Ingles v. Beaty* (1878), 2 A.R. 453. (The principles governing the charging of executors with interest are stated in the judgment of Moss, C.J.A., and the English cases are fully reviewed.)

Compound
interest.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted on that supposition for many years, without objection from those interested under the will, and it did not appear that he had used the money in trade, it was held that under the circumstances he was only chargeable with simple interest. *Ingles v. Beaty. Ibid.*

The English rules regulating the award of interest against executors and trustees may be approximated in Ontario: (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of six per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money, and (3) By charging him who makes gain out of his trust by embarking the money in speculative or trading adventures with the profits, or with compound interest, as the case may be. *In re Honsberger* (1885), 10 O.R. 521. See *Smith v. Roe* (1865), 11 Gr. 311.

Where executors kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased, and it was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was, but the notes and mortgages held by the executors bore interest for the most part at six per cent., the Master charged the executors with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. It was held on appeal that the interest should be charged at six per cent., but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis v. Beaty* (1873), 2 A.R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors. *In re Honsberger* (1885), 10 O.R. 521.

Annual
rests.

Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use, the Court ordered the accounts to be taken against him with annual rests. *Wiard v. Gable* (1860), 8 Gr. 458.

Both
executors
liable.

When one of two executors who was entitled under the will of his testator to a large sum charged on the real estate,

but which could not be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, had applied in his own business a portion of the personal estate, which was by the will directed to be invested, and which, although large, was not equal in amount to the charge in his favour on the realty, and his co-executor, though aware of such application, had not taken any steps to prevent the same, it was held that they were both equally liable to account for the whole of the said principal sum and interest with rests. *Re Crowter, Crowter v. Hinman* (1885), 10 O.R. 159, distinguished. *Archer v. Severn* (1886), 13 O.R. 316.

Where a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made, if the proceeds be distributable by the executor, he shall have the power by implication. *Re Daly, Daly v. Brown* (1907), 39 S.C.R. 122. Implied powers of executor.

In every action commenced by an executor, in which the defendant becomes entitled to costs, judgment ought to be entered against such executor personally. *Granger v. O'Neill*, 31 N.S.R. 462. Costs.

CHAPTER XLVI.

ADMINISTRATION PROCEEDINGS.

PROCEEDINGS relating to the administration of estates of deceased persons may be commenced, according to the circumstances, in (1) the Chancery Division of the High Court, (2) the County Court, or (3) in Bankruptcy.

SECT. 1.—*Proceedings in the Chancery Division.*

The jurisdiction of the Chancery Division is under s. 34 of the Judicature Act, 1873.

The proceedings may be commenced either by writ of summons or by originating summons under Ord. 55 (a).

Proceedings by originating summons are, generally speaking, more expeditious and less expensive than by writ of summons. In an action by writ of summons the proceedings take the usual course of an ordinary action with pleadings and notice of trial, unless otherwise ordered under the summons for directions pursuant to Ord. 30 of R. S. C. By originating summons there are no pleadings, but the summons itself, supported generally merely by affidavit evidence, is disposed of by the master or judge in chambers, unless adjourned to be heard in Court.

Although the plaintiff is not precluded in any case from commencing the proceedings by writ of summons, yet, whenever the plaintiff has issued a writ, and the proceedings might have been commenced by originating summons, he will have to justify the course pursued on special grounds, otherwise

(a) The Public Trustee Act, 1906 (8 Edw. VII. c. 55), s. 4, enables the public trustee, in accordance with the rules, to take the opinion

of the High Court on any question arising in the course of any administration without judicial proceedings.

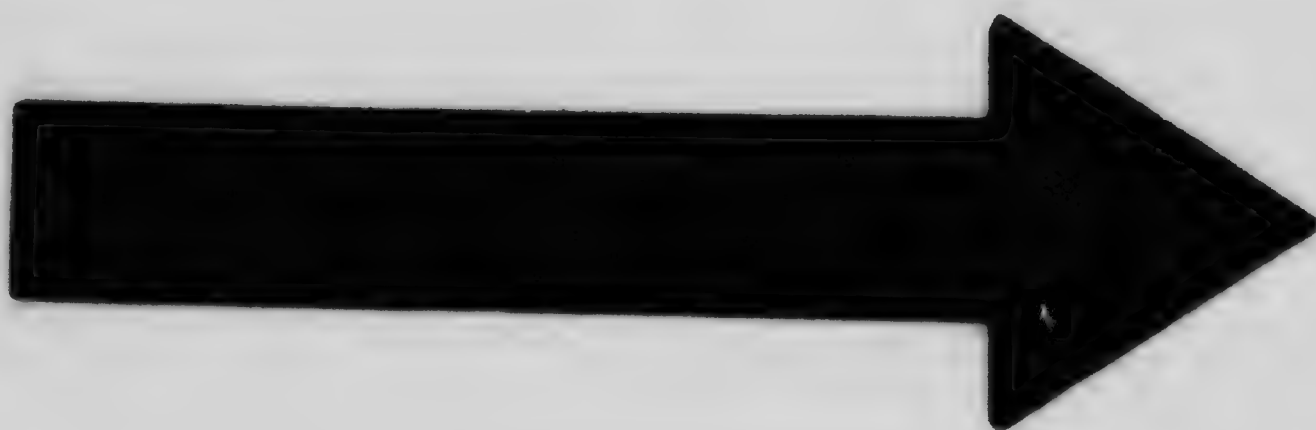
he may be ordered to pay any extra costs thereby occasioned.

With regard to proceedings by originating summons, Ord. 55 provides as follows:—

Proceedings
by originat-
ing summons.

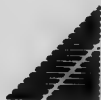
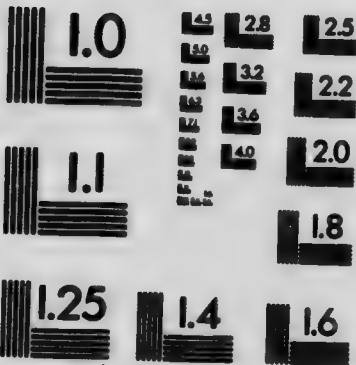
Rule 8. "The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:—

- (a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law, or *cestui que trust* :
- (b) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others :
- (c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts :
- (d) The payment into Court of any money in the hands of the executors or administrators or trustees :
- (e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees :
- (f) The approval of any sale, purchase, compromise, or other transaction :
- (g) The determination of any question arising in the administration of the estate or trust."



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Rule 4. "Any of the persons named in the last preceding Rule may in like manner apply for and obtain an order for—

- (a) the administration of the personal estate of the deceased :
- (b) the administration of the real estate of the deceased :
- (c) the administration of the trust."

Rule 4A. "If for the purpose of the Land Transfer Act, 1897, it is desirable to ascertain the heir-at-law or any devisee or legatee of the person who has died, having real estate vested in him, within the meaning of that Act, the same may be ascertained and all necessary directions with regard to carrying out the provisions of that Act may be given on any originating summons taken out under Rules 3 or 4 of this order."

Rule 5. "The persons to be served with the summons under the last two preceding Rules in the first instance shall be the following (that is to say):—

A. Where the summons is taken out by an executor or administrator or trustee—

- (a) for the determination of any question, under sub-sections (a), (e), (f), or (g) of Rule 3, the person, or one of the persons, whose rights or interests are sought to be affected :
- (b) for the determination of any question, under sub-section (b) of Rule 3, any member or alleged member of the class :
- (c) for the determination of any question, under sub-section (c) of Rule 3, any person interested in taking such accounts :
- (d) for the determination of any question, under sub-section (d) of Rule 3, any person interested in such money :
- (e) for relief under sub-section (a) of Rule 4, the residuary legatees, or next-of-kin, or some of them :
- (f) for relief under sub-section (b) of Rule 4, the residuary devisees or heirs, or some of them :
- (g) for relief under sub-section (c) of Rule 4, the *cestui que trust* ; or some of them :

(h) if there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur :

B. Where the summons is taken out by any person other than the executors, administrators, or trustees, the said executors, administrators or trustees."

Having regard to the facility given by these rules of obtaining the opinion of the Court in matters of doubt and difficulty arising in the administration of estates, it is advisable in such cases for executors and administrators to avail themselves of the rules, and apply to the Court, rather than to run risk of personal liability in acting on the opinion of solicitor or counsel, which in many cases is no indemnity (b). Trustees are entitled to the fullest possible protection which the Court can give them, and on applying to the Court under advice, though it may appear to be unsound, will not be readily treated as not acting with propriety, and be deprived of costs (c).

The rule as to costs in proceeding by originating summons is stated by Kekewich, J., in *Re Buckton* (d).

Rule as to costs on originating summons.

Where the applicants are trustees asking the Court to construe the instrument of trust for their guidance, or to have some question determined which has arisen in the administration of the trusts, the cost of all parties, being incurred for the benefit of the estate, are taxed as between solicitor and client and paid out of the estate.

The same rule is observed if the application is made by some of the beneficiaries by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, but for some reason a different course has been deemed more convenient.

But where the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really taking advantage of the convenient procedure by originating

(b) See observations of Stirling, J., in *Re Partington*, (1888) 57 L. T. (N. S.) 654, 660; and see Williams (10th ed.) 1548.

(c) *Re Buckton*, [1907] 2 Ch. 406,

414.

(d) *Ubi sup.*; as to costs in Chancery proceedings generally, see *ante*, p. 312.

summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, the rule that the unsuccessful party should pay the costs ought to be rigidly enforced as between the adverse litigants, though it may be sometimes a question whether he should bear the trustees' costs.

Jurisdiction
on originating
summons.

The object of the above rules was to afford an opportunity of obtaining a decision in a summary way of questions affecting the administration of an estate or trust where it would previously have been necessary to have a decree or judgment for the administration of the estate or execution of the trust (*e*), and the Court has jurisdiction to determine upon an originating summons such questions only as the Court could have determined in an administration action before the order came into existence (*f*).

It has no jurisdiction on originating summons to decide questions between the representative of the deceased person and a person claiming adversely to the estate (*g*), or between persons claiming under a Will and a person claiming adversely to the Will (*h*).

For instance, it cannot decide on originating summons a question between the executor or administrator and a person claiming a certain sum, whether the sum in question belongs to the estate or to the person claiming it as his own (*i*); or a question arising between devisees and other persons not devisees or interested in the estate of the deceased (*k*); or between persons claiming as devisees and the heir-at-law of the testator claiming the property as undisposed of (*l*); or between an infant and his father, whether the latter is entitled to an estate by the curtesy out of the mother's undisposed of real estate (*m*); or between the trustees of the Will of a legal devisee of real estate of a testator and

(*e*) *Re William Davies*, (1888) 38 C. D. 210, 212.

(*f*) *Re Carlyon*, (1886) 56 L. J. Ch. 219.

(*g*) *Re Royle*, (1889) 43 C. D. 18.

(*h*) *Re Bridge*, (1887) 56 L. J. Ch. 779; *Re William Davies*, (1888) 38

C. D. 210.

(*i*) *Re Bridge*, *ubi sup.*

(*k*) *Re William Davies*, *ubi sup.*

(*l*) *Re Carlyon*, *ubi sup.*, per North, J.

(*m*) *Hope v. Hope*, [1892] 2 Ch.

336.

the trustees of a resettlement made by another person claiming as legal devisee in remainder of the estate (*n*).

But where the personal representative in whom the legal estate in fee of property is vested, and is in possession of the property, desires to have a decision to whom, according to the true construction of the Will, he ought to hand over the property, he may properly apply to the Court by originating summons under Ord. 55, r. 3 (*o*).

So also an equitable tenant for life of a settled estate may apply by originating summons in a proper case to be let into possession (*p*).

With regard to claims arising out of breaches of trust it is the rule of the Court that in any contested case an originating summons is not the proper mode of procedure for deciding the question, except with respect to those cases in which an executor or trustee would be found liable simply on the common account for moneys come to his hands as such executor or trustee (*q*). It would not be competent for an applicant on an originating summons to ask for or obtain, otherwise than by consent, an order founded on breach of trust or inquiries pointing to wilful default (*r*).

Claims arising out of breaches of trust.

Nor, it would seem, would an originating summons, except by consent, be the proper procedure by a beneficiary against the executor or trustee for the execution of the trusts of the Will after the residuary estate has been distributed and a release executed (*s*).

After a common order for administration leave will be given to the plaintiff to bring a fresh action against the executor charging wilful default without proof that he did not become aware of the facts relied on in time to utilise them in the former proceeding (*t*).

(*n*) *Ibid.*

(*o*) *Re Hargreaves*, (1890) 43 C. D. 401.

(*p*) *Re Newen*, [1894] 2 Ch. 297; *Re Hunt*, (1900) 44 Sol. J. 314.

(*q*) *Re Stuart*, (1896) 74 L. T. 546.

(*r*) See *Re Weall*, (1889) 37 W. R. 779, per Kekewich, J.; *Dowse v. Gor-*

ton, [1891] A. C. 190, 202, per Ld. Macnaghten.

(*s*) *Re Garnett*, (1885) 31 C. D. 1, 12; *Re Ellis*, (1888) 59 L. T. 924.

(*t*) *Re Kurtz*, (1904) 90 L. T. 12; but cf. *Re Wrightson*, [1908] 1 Ch. 789; and see *ante*, p. 566.

Power to
appoint
receiver and
manager on
originating
summons.

Third party
notice not
applicable :

nor inquiry
as to priori-
ties depend-
ing on
questions of
disputed
fact ;

nor service
out of the
jurisdiction.

When objec-
tion to juris-
diction should
be taken.

Time for
appeal.

Discretion of
executor or
administra-
tor, to what
extent inter-
fered with.

The Court has jurisdiction in proceedings commenced by originating summons to appoint a receiver and manager of a business, and a receiver of residuary personalty (*u*).

A third party notice under Ord. 16, 48, 55, where a defendant claims to be entitled to contribution or indemnity, is not applicable to proceedings by originating summons (*x*).

The procedure by originating summons does not seem applicable to an inquiry as to priorities between mortgagees, if the question turns on disputed facts which the judge may properly decline to decide on affidavit (*y*).

Whenever it will be necessary to serve any party out of the jurisdiction the proceeding must be by writ of summons, since the Court cannot order service of an originating summons out of the jurisdiction (*z*). In practice a person out of the jurisdiction will generally consent to instruct a solicitor here to act for him, and thus submit to the jurisdiction, and get over the difficulty as to service.

Any objection to the jurisdiction ought to be taken in chambers, and if the objection is taken for the first time after the adjournment into Court, and in consequence the summons is dismissed, the defendant will not be allowed the costs of the adjournment (*a*). And if the objection is not taken in the Court of first instance the defendant will not be allowed to take it in the Court of Appeal (*b*).

An originating summons taken out under Ord. 55, r. 8, is an action within the definition of s. 100 of the Judicature Act, 1873, and therefore a final order made thereon is appealable at any time within one year from its date (*c*).

Order 55, r. 12, provides that the issue of a summons under r. 8 shall not interfere with or control any power or discretion vested in any executor or administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought.

(*u*) *Re Francke*, (1888) 58 L. T. 305. C. D. 210.

(*x*) *Re Wilson*, (1890) 45 C. D. 266.

(*b*) *Re Turcan*, (1888) 58 L. J. Ch. 101.

(*y*) *Re Giles*, (1890) 43 C. D. 391.

(*c*) *Re Fawsitt*, (1885) 30 C. D. 231 ;

(*z*) *Re Busfield*, (1886) 32 C. D. 123.

Re Vardon's Trusts, (1886) 55 L. J.

(*a*) *Re William Davies*, (1888) 38

Ch. 259.

It is not obligatory to make a judgment or order for the administration of the estate of a deceased person if the question between the parties can be properly determined without such judgment or order (d).

Not obligatory to make order for administration.

Upon the application for administration, where no accounts, or insufficient accounts, have been rendered, the application may be ordered to stand over for a certain time for accounts to be rendered, with an intimation that if not rendered the defendants may be made to pay the costs of the proceedings; and when the application is rendered necessary to prevent proceedings by other creditors or by persons beneficially interested, the usual judgment or order for administration may be made with a direction that no proceedings are to be taken under it without the leave of the judge in person (e).

An order for general administration or for accounts or inquiries concerning the property of a deceased person must be made by the judge in person (f).

Orders to be made by judge in person.

Whether an order for general administration or partial administration should be made must depend on the circumstances of each case. A decree short of general administration will not affect the right of creditors to sue or the right to prefer creditors (g). Moreover, the difficulties connected with the case may be such as to render general administration advisable for the protection of the personal representative, as where questions arise as to the carrying on or winding up businesses of the testator (h); or for protection of infants interested, as where property is tied up for a long period and there is outstanding property of a hazardous nature (i).

When order for general administration will be made.

Where a testator directs his executors to take proceedings to have his estate administered by the Court, it is the duty of the executors to commence proceedings for that purpose; but the direction does not deprive the Court of its discretion to refuse to make an order for administration, although weight

(d) Ord. 55, r. 10.

(e) Ord. 55, r. 10A.

(f) Ord. 55, r. 15A.

(g) *Re Barrett*, (1889) 43 C. D.

(h) *Re Dickinson*, (1884) W. N. 199.

(i) *Re Wilson*, (1885) 28 C. D.

ought to be given to such direction in considering whether the order should be made (k).

Subsequent proceedings to be assigned to same judge.

After a summons has been taken out under Ord. 55, r. 3 or r. 4, every subsequent summons relating to the same estate must be assigned to the same judge, and if not, the executor or administrator must apply for the transfer of it to him (l).

Conduct of proceedings in concurrent actions.

As a general rule where there are concurrent actions for administration and a judgment is obtained in one of them, the conduct of proceedings is given to the plaintiff in the action which was commenced first. But the Court can act as under special circumstances it thinks right, and where an admitted creditor by proceeding diligently has obtained an order, the conduct will not be taken from him and be given to a person whose claim is *bonâ fide* disputed (m).

Consolidation and stay of proceedings.

The Court will not allow multiplicity of actions or vexatious proceedings, and will order consolidation of concurrent actions and a stay of proceedings where all the relief required can be obtained in one and the same proceeding (n).

Notice to be given of statutory defence.

In proceedings where there are no pleadings any party intending to rely on the Statute of Limitations or the Statute of Frauds should give notice by letter or affidavit of the ground of defence, so that the party whose claim is met by the statute may be prepared with his reply (o).

Effect of Ord. 16.

Order 16 contains several rules for facilitating procedure in administration proceedings.

Executors and administrators to represent the estate without joining beneficiaries.

Rule 8 enables executors and administrators to sue and be sued on behalf of or as representing the estate without joining any of the persons beneficially interested, unless the Court or judge should otherwise order. This rule obviously would not apply where the question is one of account and the executors or administrators are the accounting parties (p).

In approving compromise service on absent parties may be dispensed with.

Rule 9A provides that where a compromise is proposed and some of the parties interested are not parties in the

(k) *Re Stocken*, (1888) 38 C. D. 319.

(l) Ord. 55, r. 11.

(m) *Re Ross*, [1907] 1 Ch. 482.

(n) See Seton (6th ed.) 835.

(o) *Re Shearman, deceased*, (1886)

2 T. R. 236; and see Ord. 19 and 15 as to what matters must be raised in the pleadings.

(p) *May v. Newton*, (1887) 34 C. D. 349.

proceedings, but there are other persons in the same interest before the Court and assenting, the Court or judge if satisfied that the compromise will be for the benefit of the absent parties, and that to require service on them would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts.

Rule 82 (a) provides that in cases of construction, if the Court or judge consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before the heir-at-law, customary heir, next-of-kin, or class whose rights may be affected shall have been ascertained by means of inquiry or otherwise, the Court or judge may appoint some one or more persons to represent such heir-at-law, customary heir, next-of-kin, or class, and the judgment of the Court or judge in the presence, of such persons shall be binding upon the heir-at-law customary heir, next-of-kin or class so represented.

On questions of construction representation order may be made.

(b) "In any other case in which an heir-at-law, or customary heir, or any next-of-kin or a class shall be interested in any proceedings, the Court or judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next-of-kin or class, and the judgment or order of the Court or judge in the presence of the persons so appointed shall be binding upon the persons so represented."

Also in any other case of difficulty in ascertaining persons interested and to save expense.

Rule 83 provides that any residuary legatee or next-of-kin entitled to a judgment or order for the administration of the personal estate of a deceased person may have the same without serving the remaining residuary legatees or next-of-kin.

Any residuary legatee or next-of-kin may obtain order for administration without serving others ;

Rule 84 provides that any legatee interested in a legacy charged on real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be

also any legatee in respect of

legacy
charged on
real estate or
proceeds of
real estate ;

also any resi-
duary devisee
or heir ;

also any exe-
cutor, admin-
istrator or
trustee
against any
one benefi-
ciary.

Discretion of
Court or
judge as to
adjoining
parties :

also as to
service of
notice of
judgment or
order on
persons not
parties so as to
bind them ;

also to pro-
ceed in
absence of
legal personal
representa-
tive of any
deceased
person.

entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

Rule 85 provides that any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir.

Rule 88 provides that any executor, administrator or trustee entitled thereto may have a judgment or order against any one legatee, next-of-kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

Rule 89 provides that the Court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just, for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 40 provides that wherever, in any action for the administration of the estate of a deceased person a judgment or an order has been pronounced or made affecting the rights or interests of persons not parties to the action, the Court or judge may direct that any persons interested in the estate shall be served with notice of the judgment or order ; and after such notice such persons shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or judge to discharge, vary or add to the judgment or order.

Rule 46 enables the Court or judge where any deceased person who was interested in the matter in question has no legal personal representative to proceed in the absence of any such person, and may appoint some person to represent his estate for all the purposes of the proceeding, and any order consequent thereon shall bind the estate of the deceased person.

It would seem that this last rule will not apply to the following cases (q) :—

1. Where the estate of the deceased person is that which is being administered in the suit;
2. Where the interest of the deceased person is adverse to that of the plaintiff;
3. Where the representative of the deceased person has active duties to perform.

Rule 47 provides that except by leave no party other than the executor or administrator shall be entitled to appear either in Court or in chambers on the claim of any person not a party against the estate in respect of any debt or liability. Under this rule even the plaintiff creditor has no right to attend; and under the general power of the Court liberty to attend the proceedings generally in reference to claims will not be granted to a creditor not a party even at his own expense (r).

Appearance on claims of persons not parties.

Extensive administrative powers are given to the Public Trustee by the Public Trustee Act, 1906, and s. 3 (5) enables the Court where proceedings have been instituted for the administration of estates of small value to order that the estate shall be administered by the Public Trustee instead of the Court (s).

Administration by Public Trustee.

SECT. 2.—*Proceedings in the County Court.*

Actions may be brought in the County Court for administration or accounts relating to the estates of deceased persons. This jurisdiction is concurrent with the jurisdiction of the High Court, but is limited to estates not exceeding £500 in amount or value (t).

Extent of jurisdiction.

A transfer may be ordered of proceedings in the High Court which might have been commenced in the County Court (u), but special reasons must be shown (v).

Orders for transfer.

(q) *Moore v. Morris*, (1871) L. R. 719.
13 Eq. 139, 140, on corresponding section of Chancery Procedure Act, 15 & 16 Vict. c. 86, s. 44.

(s) See Appendix.
(t) 51 & 52 Vict. c. 43, s. 67 (1).
(u) Sect. 69.

(r) *Re Schwabacher*, [1907] 1 Ch.

(v) *Pard v. Hine*, (1868) 18 L. T. 705.

The predominating considerations on applications for transfer would seem to be convenience, delay and expenses, and consequently orders for transfer have been made where the majority of the claimants reside in the district in which the debtor resided, and the estate is believed to be insolvent, the County Court being the proper Bankruptcy Court (*x*).

Distributive share, or legacy under £50.

The County Court has also jurisdiction to order payment of a distributive share under an intestacy, or any legacy, not exceeding £50 (*y*).

Practice.

The practice in the County Court is assimilated to the practice of the High Court (*z*).

(3) *Proceedings in Bankruptcy.*

On petition.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 53), s. 125, enables any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition, to present a petition in bankruptcy for the administration of the estate of the deceased debtor according to the law of bankruptcy, and an order for administration may be made accordingly.

By transfer.

The Act also authorises a transfer on the application of any creditor to the Court exercising jurisdiction in bankruptcy of proceedings commenced in any Court of Justice for the administration of the deceased debtor's estate on proof that the estate is insufficient to pay its debts.

Under s. 21 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), the power of transfer may be exercised without the application of any creditor, and whenever the Court is satisfied that the estate is insufficient to pay its debts. The transfer may be ordered after judgment for administration has been given (*a*).

The power to transfer is a discretionary power and not a power which the judge is bound to exercise whenever the

(*x*) *Senhouse v. Mawson*, (1885) 52 L. T. 745; *Re York*, (1887) 36 C. D. 293.

(*y*) Sect. 58.

(*z*) See *Williams* (10th ed.) 1686 *et seq.*, and *Annual County Court Practice*.

(*a*) *Re York*, *ubi sup.*

estate is shown to be insolvent. The predominating considerations would seem to be convenience, delay, and expense. The circumstance that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which right would be recognized in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer(b).

Where a member of a partnership dies insolvent and an order is made under s. 125 for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the Court has jurisdiction to direct the proceedings in the two estates to be consolidated(c).

Consolidation
in partner-
ship proceed-
ings.

The property which vests in the trustee under an administration order made under s. 125 and is to be administered for the benefit of the creditors of the deceased is the property of the deceased subject to any liabilities and rights which attached to it in his hands(d). With regard to an execution creditor, by s. 26 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), the writ of *fi fieri facias* or other writ of execution against goods binds the property in the goods as from the delivery of the writ to the sheriff, but not so as to prejudice a purchaser in good faith without notice. Under s. 61(1) "goods" include all chattels personal other than things in action and money. It is only by s. 12 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), that money, bank notes, negotiable instruments, and other securities for money can be seized and taken under a writ of *fi. fa.*, but it is merely a right to seize, and that right dies upon the death of the execution debtor and the money becomes the property of his personal representative, and it is too late then for the sheriff to do any act by way of seizing it(e).

Rights of
execution
creditors of
the deceased.

(b) *Re Baker*, (1890) 44 C. D. 262; and see *Re Rhoades*, [1899] 2 Q. B. 347.

(c) *Re Greaves*, [1904] 2 K. B. 493; and see *ante*, p. 368, as to the order of application of the joint

and separate estates in payment of creditors.

(d) *Hasluck v. Clark*, [1899] 1 Q. B. 699.

(e) *Johnson v. Pickering*, [1908] 1 K. B. 1; see also *ante*, p. 536.

CANADIAN NOTES.

Trustees and executors stand in a different position from creditors or *cestuis que trust* as to the right to have the estate administered in the Court, and cannot without experiencing some difficulty in carrying out the trusts or administering the estate file a bill for that purpose. *Cole v. Glover* (1869), 16 Gr. 392. See also *McGill v. Courtice* (1870), 17 Gr. 271.

Discretion
of court.

On an application by a legatee for an order under Rule 766 of the Queen's Bench Act, 1895, for administration of the testator's estate the Court has a discretion to grant or refuse the order, although more than a year has passed since the death of the testator, and when the executors are doing their best to realize the assets and are in no default the application should be refused. *In re O'Connor, O'Connor v. Fahy* (1898), 12 Man. 325.

Surviving
partner.

In the administration by the Court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors. *In re Ruby, Trusts Corporation of Ontario v. Ruby* (1897), 24 A.R. 509.

Although the general rule is that in an administration suit a debtor of the estate is not a proper party, in the absence of collusion or insolvency, it is not limited to these cases but applies equally when the creditor has obtained property from an executor hastily, improvidently or contrary to his duty, which is known to the creditor. *Bank of Toronto v. Beaver*, (1878), 26 Gr. 102. See *Irwin v. Bick* (1874), 6 P.R. 183.

A mandamus or prohibition may be awarded to enforce the right of a sole next of kin. *Carr v. O'Rourke* (1902), 3 O.L.R. 632.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an admin-

istration action instituted by other residuary legatees in which they have not been added as parties, and of which they have received no notice. The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations. *Uffner v. Lewis* (1899), 27 A.R. 242.

Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of and endorsed by the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances. *In re Jelly, Union Trust Co. v. Gamon* (1903), 6 O.L.R. 481. Corroboration.

The plea of *plene administravit* was held bad, where it appeared that there was valuable real estate which the administrator might have made available as assets, but which had not been administered. *Northup v. Cunningham* (1890), 24 N.S.R. 188.

Testator after appointing executors provided that in case any of the legatees offered "obstructions" to the proceedings of the executors in fulfilment of the powers conferred on the executors such legatees should lose their claim on his estate. It was held in an administration suit by one of the legatees against the executors, on the application of other legatees, that an enquiry might properly be directed whether any forfeiture of legacy had taken place. *Miller v. McNaughton* (1862), 9 Gr. 545.

Legatees are not necessary parties defendant in an administration suit. *Harrison v. Shaw* (1866), 2 Ch. Ch. 44.

In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by an

other solicitor in the Master's office. *Gorham v. Gorham* (1870), 17 Gr. 386.

A petition to set aside administration order on the ground of champerty was dismissed, it being held that a decree for administration is for the benefit of all the creditors, and in this case another creditor had established a claim under it. *Re Cannon, Oates v. Cannon* (1887), 13 O.R. 70.

Where the plaintiff at the request of the mother and natural guardian of infant heirs, advanced money to pay debts of their ancestor to save costs of suits therefor, it was held that he was entitled to sustain a suit for administration as a creditor. *Glass v. Munsen* (1865), 12 Gr. 77.

A receiver appointed by the Court to aid a judgment creditor in recovering his claim by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor. *Mones v. McCallum* (1897), 17 P.R. 398.

As to the right to entertain an administration suit, within twelve months of testator's death, see *Barrett v. Harper* (1907), 3 E.L.R. 89; *Townshend v. Brown* (1890), 22 N.S.R. 423.

APPENDIX.

THE PUBLIC TRUSTEE ACT, 1906.

6 EDW. VII. c. 55.

An Act to provide for the appointment of a Public Trustee and to amend the Law relating to the administration of Trusts.
[21st December, 1906.]

A.D. 1906.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

ESTABLISHMENT OF PUBLIC TRUSTEE.

1.—(1) There shall be established the office of public trustee. Office of public trustee.

(2) The public trustee shall be a corporation sole under that name, with perpetual succession and an official seal, and may sue and be sued under the above name like any other corporation sole, but any instruments sealed by him shall not, by reason of his using a seal, be rendered liable to a higher stamp duty than if he were an individual.

POWERS AND DUTIES OF PUBLIC TRUSTEE.

2.—(1) Subject to and in accordance with the provisions of this Act and rules made thereunder, the public trustee may, if he thinks fit— General powers and duties of public trustee.

- (a) act in the administration of estates of small value;
- (b) act as custodian trustee;
- (c) act as an ordinary trustee;
- (d) be appointed to be a judicial trustee;
- (e) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870.

33 & 34 Vict.
c. 23.

A.D. 1906.

(2) Subject to the provisions of this Act, and to the rules made thereunder, the public trustee may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed in pursuance of this Act, and shall have all the same powers, duties, and liabilities, and be entitled to the same rights and immunities and be subject to the control and orders of the Court, as a private trustee acting in the same capacity.

(3) The public trustee may decline, either absolutely or except on the prescribed conditions, to accept any trust, but he shall not decline to accept any trust on the ground only of the small value of the trust property.

(4) The public trustee shall not accept any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under this Act, nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent.

(5) The public trustee shall not accept any trust exclusively for religious or charitable purposes, and nothing in this Act contained, or in the rules to be made under the powers in this Act contained, shall abridge or affect the powers or duties of the official trustee of charity lands or official trustees of charitable funds.

(1) In the Administration of Small Estates.

Administra-
tion of small
estates.

3.—(1) Any person who in the opinion of the public trustee would be entitled to apply to the Court for an order for the administration by the Court of an estate, the gross capital value whereof is proved to the satisfaction of the public trustee to be less than one thousand pounds, may apply to the public trustee to administer the estate, and, where any such application is made and it appears to the public trustee that the persons beneficially entitled are persons of small means, the public trustee shall administer the estate, unless he sees good reason for refusing to do so.

(2) On the public trustee undertaking, by declaration in writing signed and sealed by him, to administer the estate the trust property other than stock shall, by virtue of this

Act, vest in him, and the right to transfer or call for the transfer of any stock forming part of the estate shall also vest in him, in like manner as if vesting orders had been made for the purpose by the High Court under the Trustee Act, 1893, and that Act shall apply accordingly. As from such vesting any trustee entitled under the trust to administer the estate shall be discharged from all liability attaching to the administration, except in respect of past acts:

A.D. 1906.

56 & 57 Vict.
c. 53.

Provided that—

- (a) the public trustee shall not exercise the right of himself transferring the stock without the leave of the Court; and
- (b) this sub-section shall not apply to any copyhold land forming part of the estate, but the public trustee shall, as respects such land, have the like powers as if he had been appointed by the Court under section thirty-three of the Trustee Act, 1893, to convey the land, and section thirty-four of that Act shall apply accordingly.

(3) For the purposes of the administration the public trustee may exercise such of the administrative powers and authorities of the High Court as may be conferred on him by rules under this Act, subject to such conditions as may be imposed by the rules.

(4) Rules shall be made under this Act for enabling the public trustee to take the opinion of the High Court on any question arising in the course of any administration without judicial proceedings, and otherwise for making the procedure under this section simple and inexpensive.

(5) Where proceedings have been instituted in any Court for the administration of an estate, and by reason of the small value of the estate it appears to the Court that the estate can be more economically administered by the public trustee than by the Court, or that for any other reason it is expedient that the estate should be administered by the public trustee instead of the Court, the Court may order that the estate shall be administered by the public trustee, and thereupon (subject to any directions by the Court) this section shall apply as if the administration of the estate had been undertaken by the public trustee in pursuance of this section.

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Custodian
trustee.(2) *As Custodian Trustee.*

4.—(1) Subject to rules under this Act the public trustee may, if he consents to act as such, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust—

- (a) by order of the Court made on the application of any person on whose application the Court may order the appointment of a new trustee; or
- (b) by the testator, settlor, or other creator of any trust; or
- (c) by the person having power to appoint new trustees.

(2) Where the public trustee is appointed to be custodian trustee of any trust—

- (a) The trust property shall be transferred to the custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act, 1898 :
- (b) The management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are herein-after referred to as the managing trustees) :
- (c) As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustees shall have free access thereto and be entitled to take copies thereof or extracts therefrom :
- (d) The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into Court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but unless he so concurs, the custodian trustee shall not be liable

A.D. 1906.

for any act or default on the part of the managing trustees or any of them :

- (e) All sums payable to or out of the income or capital of the trust property shall be paid to or by the custodian trustee: Provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application thereof, and shall not be answerable for any loss or misapplication thereof :
- (f) The power of appointing new trustees, when exerciseable by the trustees, shall be exerciseable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the Court for the appointment of a new trustee as any other trustee :
- (g) In determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee :
- (h) The custodian trustee, if he acts in good faith, shall not be liable for accepting as correct and acting upon the faith of any written statement by the managing trustees as to any birth, death, marriage, or other matter of pedigree or relationship, or other matter of fact, upon which the title to the trust property or any part thereof may depend, nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee :
- (i) The Court may, on the application of either the custodian trustee, or any of the managing trustees, or of any beneficiary, and on proof to their satisfaction that it is the general wish of the beneficiaries, or that on other grounds it is expedient, to terminate the custodian trusteeship, make an order for that purpose, and the Court may thereupon make such vesting orders and give such directions as under the circumstances may seem to the Court to be necessary or expedient.

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(3) The provisions of this section shall apply in like manner as to the public trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee.

(3) *As an Ordinary Trustee.*

Appointment
of public
trustee to be
trustee,
executor, &c.

5.—(1) The public trustee may by that name, or any other sufficient description, be appointed to be trustee of any will or settlement or other instrument creating a trust or to perform any trust or duty belonging to a class which he is authorised by the rules made under this Act to accept, and may be so appointed whether the will or settlement or instrument creating the trust or duty was made or came into operation before or after the passing of this Act, and either as an original or as a new trustee, or as an additional trustee, in the same cases, and in the same manner, and by the same persons or Court, as if he were a private trustee, with this addition, that, though the trustees originally appointed were two or more, the public trustee may be appointed sole trustee.

(2) Where the public trustee has been appointed a trustee of any trust, a co-trustee may retire from the trust under and in accordance with section eleven of the Trustee Act, 1893, notwithstanding that there are not more than two trustees, and without such consents as are required by that section.

(3) The public trustee shall not be so appointed either as a new or additional trustee where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary, unless the Court otherwise order.

(4) Notice of any proposed appointment of the public trustee either as a new or additional trustee shall where practicable be given in the prescribed manner to all persons beneficially interested who are resident in the United Kingdom and whose addresses are known to the persons proposing to make the appointment, or, if such beneficiaries are infants, to their guardians, and if any person to whom such notice has been given within twenty-one days from the receipt of the notice applies to the Court, the Court may, if having regard to

the interests of all the beneficiaries it considers it expedient to do so, make an order prohibiting the appointment being made, provided that a failure to give any such notice shall not invalidate any appointment made under this section.

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6.—(1) If in pursuance of any rule under this Act, the public trustee is authorised to accept by that name probates of wills or letters of administration, the Court having jurisdiction to grant probate of a will or letters of administration may grant such probate or letters to the public trustee by that name, and for that purpose the Court shall consider the public trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the public trustee shall not be required for the grant of letters of administration to any other person, and that, as between the public trustee and the widower widow or next-of-kin of the deceased, the widower widow or next-of-kin shall be preferred, unless for good cause shown to the contrary.

Power as to granting probate.

(2) Any executor who has obtained probate or any administrator who has obtained letters of administration, and notwithstanding he has acted in the administration of the deceased's estate, may, with the sanction of the Court, and after such notice to the persons beneficially interested as the Court may direct, transfer such estate to the public trustee for administration either solely or jointly with the continuing executors or administrator, if any. And the order of the Court sanctioning such transfer shall, subject to the provisions of this Act, give to the public trustee all the powers of such executor and administrator, and such executor and administrator shall not be in any way liable in respect of any act or default in reference to such estate subsequent to the date of such order, other than the act or default of himself or of persons other than himself for whose conduct he is in law responsible.

LIABILITY: OFFICERS AND OFFICES: FEES.

7.—(1) The Consolidated Fund of the United Kingdom shall be liable to make good all sums required to discharge any liability which the public trustee, if he were a private trustee, would be personally liable to discharge, except where

Liability of Consolidated Fund.

A.D. 1906. the liability is one to which neither the public trustee nor any of his officers has in any way contributed, and which neither he nor any of his officers could by the exercise of reasonable diligence have averted, and in that case the public trustee shall not, nor shall the Consolidated Fund, be subject to any liability.

(2) All sums payable in pursuance of this section out of the Consolidated Fund shall be charged on and issued out of that fund or the growing produce thereof.

Officers and
offices.

8.—(1) The Lord Chancellor shall appoint a fit person to the office of public trustee, who shall hold office during pleasure, and receive such salary or fees, and be appointed on such terms, as the Treasury may determine.

(2) The Lord Chancellor shall appoint such persons to be officers of the public trustee as, subject to the sanction of the Treasury, he may consider necessary for the purposes of this Act, and those officers shall hold office upon such terms, and be remunerated at such rates and in such manner, as the Treasury may sanction.

(3) Any person appointed to be public trustee or an officer of the public trustee may, and shall, if the Treasury so require, be a person already in the public service.

(4) The public trustee shall, if so directed by the Lord Chancellor with the concurrence of the Treasury, maintain offices in London and elsewhere, and, so far as practicable, buildings already used for public purposes shall be used for such offices.

(5) The salary or remuneration of the public trustee and his officers and such other expenses of executing his office or otherwise carrying this Act into effect as may be sanctioned by the Treasury shall be paid out of moneys provided by Parliament.

Fees charged
by public
trustee.

9.—(1) There shall be charged in respect of the duties of the public trustee such fees, whether by way of percentage or otherwise, as the Treasury with the sanction of the Lord Chancellor may fix, and such fees shall be collected and accounted for by such persons, and in such manner, and shall be paid to such account, as the Treasury direct.

(2) Any expenses which might be retained or paid out of the trust property if the public trustee were a private trustee

shall be so retained or paid, and the fees shall be retained or paid in the like manner as and in addition to such expenses.

A.D. 1906.

(3) Such fees shall, under the regulations of the Treasury, be applied as an appropriation in aid of moneys provided by Parliament for expenses under this Act, and so far as not so applied shall be paid into the Exchequer.

(4) The fees under this section shall be arranged from time to time so as to produce an annual amount sufficient to discharge the salaries and other expenses incidental to the working of this Act (including such sum as the Treasury may from time to time determine to be required to insure the Consolidated Fund against loss under this Act) and no more.

(5) The incidence of the fees and expenses under this section as between capital and income shall be determined by the public trustee.

SUPPLEMENTAL PROVISIONS AS TO PUBLIC TRUSTEE.

10.—(1) A person aggrieved by any act or omission or decision of the public trustee in relation to any trust may apply to the Court, and the Court may make such order in the matter as the Court thinks just.

Appeal to the Court.

(2) Subject to rules of Court, an application under this section to the High Court shall be made to a judge of the Chancery Division of the High Court in Chambers.

11.—(1) The public trustee shall not, nor shall any of his officers, act under this Act for reward, except as provided by this Act.

Mode of action of public trustee.

(2) The public trustee may, subject to the rules made under this Act, employ for the purposes of any trust such solicitors, bankers, accountants, and brokers, or other persons as he may consider necessary, and in determining the persons to be so employed in relation to any trust the public trustee shall have regard to the interests of the trust, but subject to this shall, whenever practicable, take into consideration the wishes of the creator of the trust and of the other trustees (if any) and of the beneficiaries, either expressed or as implied by the practice of the creator of the trust, or in the previous management of the trust.

(3) On behalf of the public trustee such person as may be prescribed may take any oath, make any declaration, verify

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A.D. 1906. any account, give personal attendance at any Court or place, and do any act or thing whatsoever which the public trustee is required or authorised to take, make, verify, give or do: Provided that nothing in this Act or in any rule made under this Act shall confer upon any person not otherwise entitled thereto any right to appear, or act, or be heard in or before any Court or tribunal, on behalf or instead of the public trustee, or to do any act whatsoever on behalf or on the instructions of the public trustee, which could otherwise only be lawfully done by a barrister, or a duly certificated solicitor.

(4) Where any bond or security would be required from a private person upon the grant to him of administration, or upon his appointment to act in any capacity, the public trustee, if administration is granted to him or if he is appointed to act in such capacity as aforesaid, shall not be required to give such bond or security, but shall be subject to the same liabilities and duties as if he had given such bond or security.

(5) The entry of the public trustee by that name in the books of a company shall not constitute notice of a trust, and a company shall not be entitled to object to enter the name of the public trustee on its books by reason only that the public trustee is a corporation, and, in dealings with property, the fact that the person or one of the persons dealt with is the public trustee, shall not of itself constitute notice of a trust.

12. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a Palatine Court, include that Court, and the public trustee shall provide an address within the county palatine where service upon him of any proceedings under this Act in such Palatine Court may be effected; the rules of Court relating to the exercise of the jurisdiction of a Palatine Court under this Act shall be made by the authority having power to make general rules and orders of that Court.

INVESTIGATION AND AUDIT OF TRUST ACCOUNTS.

13.—(1) Subject to rules under this Act and unless the Court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given in the prescribed manner by any trustee or beneficiary, be investigated and audited by such solicitor or public accountant

Application
of Act to
Palatine
Courts.

Investigation
and audit of
trust
accounts.

A.D. 1906.

as may be agreed on by the applicant and the trustees or, in default of agreement, by the public trustee or some person appointed by him :

Provided that (except with the leave of the Court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit, and that a trustee or beneficiary shall not be appointed under this section to make an investigation or audit.

(2) The person making the investigation or audit (hereinafter called the auditor) shall have a right of access to the books, accounts, and vouchers of the trustees, and to any securities and documents of title held by them on account of the trust, and may require from them such information and explanation as may be necessary for the performance of his duties, and upon the completion of the investigation and audit shall forward to the applicant and to every trustee a copy of the accounts, together with a report thereon, and a certificate signed by him to the effect that the accounts exhibit a true view of the state of the affairs of the trust and that he has had the securities of the trust fund investments produced to and verified by him or (as the case may be) that such accounts are deficient in such respects as may be specified in such certificate.

(3) Every beneficiary under the trust shall, subject to rules under this Act, be entitled at all reasonable times to inspect and take copies of the accounts, report, and certificate, and, at his own expense, to be furnished with copies thereof or extracts therefrom.

(4) The auditor may be removed by order of the Court, and, if any auditor is removed, or resigns, or dies, or becomes bankrupt or incapable of acting before the investigation and audit is completed, a new auditor may be appointed in his place in like manner as the original auditor.

(5) The remuneration of the auditor and the other expenses of the investigation and audit shall be such as may be prescribed by rules under this Act, and shall, unless the public trustee otherwise directs, be borne by the estate; and, in the event of the public trustee so directing, he may order that such expenses be borne by the applicant or by the trustees personally or partly by them and partly by the applicant.

A.D. 1906.

(6) If any person having the custody of any documents to which the auditor has a right of access under this section fails or refuses to allow him to have access thereto or in anywise obstructs the investigation or audit, the auditor may apply to the Court, and thereupon the Court shall make such order as it thinks just.

(7) Subject to rules of Court, applications under or for the purposes of this section to the High Court shall be made to a judge of the Chancery Division in Chambers.

(8) If any person in any statement of accounts, report, or certificate required for the purposes of this section wilfully makes a statement false in any material particular, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, and on summary conviction to imprisonment for a term not exceeding six months, with or without hard labour, and in either case to a fine in lieu of or in addition to such punishment.

RULES : DEFINITIONS : SHORT TITLE AND EXTENT.

Rules.

14.—(1) The Lord Chancellor shall, with the concurrence of the Treasury, make rules for carrying into effect the objects of this Act, and in particular for all or any of the following purposes (that is to say) :—

- (a) establishing the office of public trustee and prescribing the trusts or duties he is authorised to accept or undertake, and the security, if any, to be given by the public trustee and his officers :
- (b) the transfer to and from the public trustee of any property :
- (c) the accounts to be kept and an audit thereof :
- (d) the establishment and regulation of any branch office :
- (e) excluding any trusts from the operation of this Act or any part thereof :
- (f) the classes of corporate bodies entitled to act as custodian trustees :
- (g) the form and manner in which notices under this Act shall be given.

(2) Every rule under this Act shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament, within the next

subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in Council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

A.D. 1906.

(8) If the rules require a declaration to be made for any purpose, a person who makes such declaration, knowing the same to be untrue in any material particular, shall be guilty of a misdemeanour.

15. In this Act, unless the context otherwise requires,— Definitions.

the expression "Court" means the High Court and, as respects trusts within its jurisdiction, the County Court:

the expression "letters of administration" means letters of administration of the estate and effects of a deceased person, whether general or with a will annexed, or limited either in time or otherwise:

the expression "trust" includes an executorship or administratorship; and the expression "trustee" shall be construed accordingly; and the expression "trust property" shall include all property in the possession or under the control wholly or partly of the public trustee by virtue of any trust:

the expression "private trustee" means a trustee other than the public trustee:

the expression "expenses" includes costs and charges:

the expression "prescribed" means prescribed for the time being by rules under this Act:

other expressions have the same meaning as in the Trustee Act, 1893.

16. This Act shall come into operation on the first day of Commence-
ment of Act.
January one thousand nine hundred and eight.

17.—(1) This Act may be cited as the Public Trustee Act, Short title
and extent.
1906.

(2) This Act shall not extend to Ireland or Scotland.

STATUTORY RULES AND ORDERS, 1907.

THE PUBLIC TRUSTEE RULES, 1907. DATED
NOVEMBER 29, 1907.

I, the Right Honourable Robert Threshie, Baron Loreburn, Lord High Chancellor of Great Britain, with the concurrence of the Treasury, by virtue and in pursuance of the Public Trustee Act, 1906, and of all other powers and authorities enabling me in this behalf, do make the following rules for carrying into effect the objects of that Act.

Interpretation.

1. In these rules the expression "the Act" means the Public Trustee Act, 1906; and unless there is anything in the context or in the Act inconsistent therewith—

The expression "trust instrument" includes any instrument by which a trust is created;

The expression "trust property" includes all property subject to a trust, or comprised in an estate, which is proposed to be administered by the public trustee;

The expression "deputy" means a deputy public trustee.

2. The Interpretation Act, 1889, applies for the purpose of the interpretation of these rules as it applies for the purpose of the interpretation of an Act of Parliament.

Establishment of Office.

3. The office of public trustee is hereby established.

Offices.

4.—(1) The central office of the public trustee shall be situate in London.

(2) Branch offices may from time to time be established as may be prescribed by the Lord Chancellor by notice in the *London Gazette*.

Deputy Public Trustees.

5. There shall be deputy public trustees at any branch offices so established, who shall be officers of the public trustee, and shall have the powers and perform the duties assigned to them by or under these rules. Their number shall be such as the Lord Chancellor, with the sanction of the Treasury, may from time to time prescribe, and every such appointment shall be notified in the *London Gazette*.

Security.

6. Security shall be given by such persons employed under the Act as the Treasury may direct for the due performance of their duties, and for the due accounting for and payment of all moneys received by them in pursuance of the Act and these rules. The security shall be for such sum and shall be given in such manner and form as the Treasury shall order in the case of each such person, and the Treasury may at any time require that the amount or nature of any such security be varied.

Trusteeships.

7.—(1) Subject to the Act and these rules the public trustee is authorised—

- (a) to accept as ordinary trustee and to act as custodian trustee of any trust created by any trust instrument or arising upon an intestacy ; and
- (b) to accept by the name of the public trustee probates or letters of administration of any kind.

Provided that he shall not accept the trusts of any instrument made solely by way of security for money.

8. The public trustee may if he thinks fit—

- (1) act as custodian trustee of a trust which involves the management or carrying on of any business but upon the conditions that (a) he shall not act in the management or carrying on of such business, and (b) he shall not hold any property of such a nature as will expose the holder thereof to any liability except under exceptional circumstances and when he is satisfied that he is fully indemnified or secured against loss ; and

- (2) accept as ordinary trustee under exceptional circumstances a trust which involves the management or carrying on of any business, but upon the conditions that except with the consent of the Treasury he shall only carry on the same (a) for a short time not exceeding eighteen months, and (b) with a view to sale disposition or winding-up, and (c) if satisfied that the same can be carried on without risk of loss.

9.—(1) A testator may appoint the public trustee to be trustee or custodian trustee under any testamentary instrument without previously applying to him for his consent to act as such.

(2) No such appointment by a testator shall have effect, and no appointment of the public trustee to be trustee or custodian trustee shall be made except by a testator, unless and until (in either case) the consent of the public trustee to act as such trustee shall have been applied for and obtained in accordance with these rules. Provided that in the case of any such appointment by a testator the public trustee shall at any time after the fact of his appointment shall have come to his knowledge be at liberty to act as if such application had been received by him.

10.—(1) An application to the public trustee to act as trustee or custodian trustee may be made

- (a) where the appointment has been made by a testator—by any trustee or beneficiary under the testamentary instrument; and
- (b) in the case of the estate of an intestate—by any person appearing to be beneficially interested in the estate; and
- (c) in any case—by the persons or any one of the persons having power under the Act to make the appointment.

(2) It shall be the duty of any person appointed by a testator to be co-trustee with the public trustee, and not renouncing or disclaiming the trust, give to the public trustee notice in writing of such appointment as soon as practicable after the same has come to his knowledge.

11.—(1) Any application under the last preceding rule shall be made in writing addressed to the public trustee at his office in London, or any branch office for the time being in existence, and may be left at or sent by post to any such office as aforesaid.

(2) Upon receiving any such application the public trustee may require to be produced to him the trust instrument (if any), and may require to be supplied to him a copy of that instrument, and of any other document affecting the trust, and such particulars as to the nature and value of the trust property, and the liabilities (if any) attaching to such property, or the holder thereof, and the names and places of abode of any beneficiaries and trustees under the trust, and such other information relating to the trust as he may consider it desirable to obtain in any particular case.

12. As soon as may be after receiving any such application the public trustee shall take into consideration upon such evidence as may appear to him sufficient—

- (a) the gross capital value of the trust property ;
- (b) the mode of investment and the condition of the trust property ;
- (c) the situation, tenure, and character of any land comprised in the trust property ;
- (d) any liabilities attaching to the trust property or the holder thereof ;
- (e) the places of abode and circumstances of the beneficiaries ; and
- (f) all the circumstances of the case.

13.—(1) Upon any application the public trustee shall decide whether the same ought to be accepted or refused, and shall forthwith give notice to the applicant of such acceptance or refusal, and in case of acceptance shall execute an instrument expressing his consent to act in the trust.

(2) Upon the acceptance of any application the public trustee shall consider and determine whether the trust shall be administered from his central office or from a branch office, and shall give directions accordingly, and any such direction may at any time be rescinded or varied by the public trustee at his discretion.

Administration of Small Estates.

14.—(1) An application under s. 3 (1) of the Act shall be made in the manner provided by Rule 11 hereinbefore contained.

(2) Upon receiving any such application the public trustee shall require to be supplied to him such evidence as to the value of the estate, and the circumstances of the persons beneficially entitled, and such other information relating thereto as he may consider it desirable to obtain in any particular case.

15.—(1) If it is not proved to the satisfaction of the public trustee that the gross capital value of the estate is less than £1,000, or if it does not appear to him that the persons beneficially entitled are persons of small means, or if he sees any other good reason for refusing the application, he shall refuse the same, and shall forthwith give notice to the applicant of such refusal.

(2) In any other case the public trustee shall make in respect of the estate the declaration mentioned in s. 3 (2) of the Act, and shall give notice to the applicant that the application is accepted, and shall take such other steps as may be necessary or proper to enable him to administer the estate; and any person having the custody of the probate or letters of administration or other document relating to the estate shall, upon the request in writing of the public trustee, deliver the same to him or as he shall direct.

(3) A refusal under this rule shall not prevent the public trustee from exercising with respect to the estate any powers (other than powers under s. 3 of the Act) exercisable by him with respect thereto under the Act and these rules, if duly appointed to exercise the same.

(4) Upon the acceptance of any application the public trustee shall consider and determine whether the estate shall be administered from his central office or from a branch office, and shall give directions accordingly, and any such direction may at any time be rescinded or varied by the public trustee at his discretion.

16. For the purposes of the administration the public trustee shall (subject as hereinafter provided) have all the

administrative powers and authorities exerciseable by a master of the Supreme Court acting in the administration of an estate.

17.—(1) The public trustee may in manner hereinafter provided and without judicial proceedings take the opinion of the High Court upon any question arising in the course of an administration.

(2) The duty of advising upon any such question shall be assigned by the Lord Chancellor to a particular judge of the Chancery Division. Provided that in the absence or upon the request of such judge any other judge of that Division, and during vacation any judge of the High Court, may act for such judge for the purposes of this rule.

(3) Any such question shall be submitted to the judge in such manner and at such time as he may direct, and shall be accompanied by such statement of facts, documents, and other information as he may require, and the public trustee shall, if the judge so desires, attend upon him at such time and place as the judge may appoint.

(4) The judge may before giving his opinion require the attendance of, or communicate with, any person interested in the estate as trustee or beneficiary, but no such person shall have a right to be heard by the judge unless he otherwise directs.

(5) The judge shall give his opinion to the public trustee, and the public trustee shall act in accordance with such opinion, and shall upon the request in writing of any such interested person communicate to him the effect of such opinion.

Administration of Trusts and Estates.

18. Subject to the provisions of the Act and of these rules and to the terms of any particular trust the public trustee may, in the administration of any trust or estate, take and use professional advice and assistance in regard to legal and other matters, and may act on credible information (though less than legal evidence) as to matters of fact.

19.—(1) There shall be kept at the central office in London of the public trustee a register (hereinafter referred to as "the principal register") of all trusts in which the public trustee

is acting as trustee or custodian trustee and of all estates in course of administration under s. 8 of the Act, and whether the same are being administered from his central office or from any branch office.

(2) There shall be entered in the principal register in respect of each trust or estate—

- (a) a distinctive letter and number ;
- (b) the date of the acceptance of the trust or of the declaration made under s. 8 (2) of the Act ;
- (c) particulars of the trust property from time to time ;
- (d) the names and place of abode of the person in receipt of the income of the trust property ;
- (e) a reference to any notice received of any dealing with any beneficial interest in the trust property and of any exercise or release of any power relating to the trust or estate ;
- (f) a record of any decision or opinion of the High Court in respect of the trust or estate ;
- (g) such records of his decisions and such other particulars as the public trustee may think fit.

20. The public trustee may invest or retain invested money belonging to any trust or estate and coming to his hands in any investment authorised by the trust instrument or (save as otherwise provided by that instrument) authorised by law for the investment of trust funds and may (save as so provided) retain any investment existing at the date of the commencement of the trust, or (where the trust arises on an intestacy) at the date of the death of the intestate. Provided that he shall not invest in or hold any investment in such manner as to expose him to liability as the holder thereof, unless he is satisfied that he is fully indemnified or secured against loss.

21. The securities and documents belonging or relating to a trust or estate of which the public trustee is a trustee or which he is administering shall if under his control be kept at the bank to the trust or at some other safe place of deposit allowed generally or specially by the Treasury, so far as the convenience of business will admit.

22.—(1) A separate account shall be kept for every trust or estate.

(2) A separate account shall be kept of the capital of the trust property and of the mode in which it is from time to time invested, and all dealings with such capital shall be entered in such account.

(3) A separate account shall be kept of the income of the trust property and of the mode in which it is from time to time dealt with by the public trustee.

23. The accounts of the public trustee shall be audited and the securities held by him verified from time to time to the satisfaction of the controller and auditor-general, in accordance with such regulations as the Treasury may make.

24. All payments of money to or from the capital of the trust property shall be made through the bank to the trust or estate.

25.—(1) No transfer by the public trustee of any securities or assurance by him of any land forming part of the trust property shall be made except under the hand and official seal of the public trustee, or under the hand and seal of an officer of the public trustee authorised in writing by him to act in that behalf either generally or in any particular case.

(2) Any such transfer or assurance by an officer so authorised shall have the same effect as if the same were made by the public trustee under his hand and official seal.

26. All sums payable out of the income or capital of the trust property shall be made by a cheque on a bank signed by the public trustee or an officer of the public trustee authorised in writing by him to act in that behalf either generally or in any particular case. Provided that in any particular case the public trustee may authorise the payment of income by the person liable to pay the same direct to the person entitled to receive the same, or to his bank.

27.—(1) The income of the trust property may be paid to the person for the time being entitled to receive the same either through a bank or direct, and where such person is a married woman may be so paid notwithstanding any restraint on anticipation.

(2) Where authority is given to any corporation or bank to pay any income to any person the books of that corporation or bank showing the payment of that income in accordance with the authority shall be a sufficient discharge to the public trustee.

(8) Where authority is given to any person to pay any income to the bank of the person entitled, the certificate of that bank stating the receipt of that income shall be a sufficient discharge to the public trustee.

(4) Where any person is solely entitled to receive any income, without any restraint on anticipation, the public trustee may, on the request in writing of that person, authorise him for such period as the public trustee may think fit to collect or arrange for the collection of such income. During the continuance of any such authority such request in writing shall be a sufficient discharge to the public trustee in respect of such income.

28. The public trustee may, if the special circumstances of the case appear to him to render it desirable, pay to his co-trustee, or allow him to receive, the income of the trust property or any part thereof, on such co-trustee undertaking to apply it in manner directed by the trust.

29. The public trustee may make advances for the purposes of any trust or estate in course of administration, or about to be administered, by him, out of any moneys which may be placed at his disposal by the Treasury for that purpose, and upon such terms as he may think proper.

30. The public trustee may at any time require a statutory declaration or other sufficient evidence that a person is alive and is the person to whom any money or property is payable or transferable, and may refuse payment or transfer until such declaration or evidence is produced.

31. Where a person appearing to be beneficially entitled to any sum of money under a trust or to be interested in the trust property cannot be found, or it is not known whether he is living or dead, the public trustee may apply to the Court for directions as to the course to be taken with reference to such person, and until an order of the Court is made shall keep any sum payable to such person, and if it is kept for more than six months shall invest the same or deposit the same at interest and shall accumulate the dividends or interest thereof.

32. Upon an application in writing by or with the authority of any person interested in the trust property the public trustee—

(a) shall permit the applicant or his solicitor or other

authorised agent to inspect and take copies of any entry in any register relating to the trust or estate and (so far as the interest of the applicant in the trust property is or may be affected thereby) of any account notice or other document in the custody of the public trustee ;

- (b) shall at the expense of the applicant supply him or his solicitor or other authorised agent with a copy of any such entry, account, or document as aforesaid, or of any extract therefrom ;
- (c) shall give to such applicant or his solicitor or other authorised agent such information respecting the trust or estate and the trust property as shall be reasonably requested in the application and shall
! within the power of the public trustee.

(2) Subject as aforesaid the public trustee shall observe strict secrecy in respect of every trust or estate in course of administration by him.

33.—(1) The public trustee may in writing authorise any deputy to exercise and perform (either generally or in relation to any particular case and subject to such conditions and restrictions (if any) as the public trustee may impose) all or any of the powers and duties of the public trustee under any of the foregoing rules, except—

- (a) the power or duty of determining whether a trust or estate shall be administered from his central office or from a branch office ; and
- (b) the powers of authorising officers of the public trustee to transfer securities or assure land or to sign cheques ;
- (c) the power of making advances for the purpose of any trust or estate.

(2) Any such authority conditions or restrictions may at any time in like manner be withdrawn or varied by the public trustee at his discretion.

34. No deputy and no firm or member of a firm of solicitors of which such deputy is a member shall, except with the consent in writing of the public trustee, and subject to such conditions as he may impose, act as solicitor or solicitors to a trust or estate which is in course of administration by such deputy.

EXECUTORS.

35. Any officer of the public trustee who shall be authorised by him in writing in that behalf may take any oath, make any declaration, verify any account, and give personal attendance at any Court or place.

Corporate Bodies as Custodian Trustees.

36.—(1) The bodies corporate entitled to act as custodian trustee shall be any such incorporated banking or insurance or guarantee or trust company or friendly society and any such body corporate established for charitable or philanthropic purposes as may be approved by the public trustee and the Treasury.

(2) The public trustee may require payment by any applicant for such approval of a fee not exceeding ten guineas.

(3) Such approval may be granted subject to such conditions as to the rendering by the body corporate, and verification, of periodical returns of business transacted, and fees and other emoluments received, and otherwise, as the Treasury may require either generally or in any particular case.

(4) Any such approval may at any time be withdrawn without reason assigned.

Investigation and Audit of Trust Accounts.

37. Any application under s. 18 (1) of the Act shall be made to the public trustee, and notice thereof shall be given (a) if the applicant is a beneficiary, to every trustee, and (b) if the applicant is a trustee, to each co-trustee and also to the person entitled to the receipt of the income of the trust property.

38. If within three months from the date of the receipt of the notice no solicitor or public accountant shall have been appointed by the applicant and the trustees to conduct the investigation and audit, there shall be deemed to be a default of agreement within the meaning of s. 18 (1) of the Act, and the applicant may apply to the public trustee accordingly.

39. The remuneration of the auditor and other expenses of the investigation and audit shall be such as may be agreed on by the trustees and the person entitled to the receipt of

the income of the trust property and the auditor, or (in default of such agreement) determined by the public trustee, who shall, in determining the same, have regard to the estimated value of the trust property, the time occupied or likely to be occupied by the investigation and audit, and the other circumstances of the case.

Miscellaneous.

40.—(1) Any notice or application required to be given or made for the purposes of the Act or these rules to the public trustee may be addressed to the public trustee at his office in London, or if the same relates to a trust or estate in course of administration or proposed to be administered from a branch office, then at that branch office.

(2) Any notice or application required to be given or made for the purposes of the Act or these rules to any person other than the public trustee may be addressed to that person at his last known place of abode or place of business.

(8) Any such notice or application may be delivered at the place to which it is addressed or may be served by post.

41. Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding in pursuance of these rules is an infant, idiot or lunatic, the guardian or (as the case may require) the committee or receiver of the estate of such person may make such application, give such consent, do such act, and be party to such proceedings as such person if free from disability might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of these rules. Where there is no guardian or committee or receiver of the estate of any such infant, idiot or lunatic, or where any person is of unsound mind or incapable of managing his affairs, but has not been found lunatic under any inquisition, it shall be lawful for the Court to appoint a guardian of such person for the purpose of any proceedings under these rules, and from time to time to change such guardian.

42. The public trustee may frame and cause to be printed and circulated or otherwise promulgated such forms and directions as he may deem requisite or expedient for facilitating proceedings under the Act and these rules.

48. These rules may be cited as "The Public Trustee Rules, 1907."

Loreburn, C.

November 29th, 1907.

We, being two of the Lords Commissioners of His Majesty's Treasury, hereby concur in the foregoing rules.

H. H. Asquith.

Joseph A. Pease.

THE PUBLIC TRUSTEE (FEES) ORDER, 1907.

We, the undersigned, being two of the Lords Commissioners of His Majesty's Treasury, with the sanction of the Lord Chancellor, in pursuance of the provisions of the Public Trustee Act, 1906, s. 9, and of all other powers, and for the purpose of fixing the fees to be charged in respect of the duties of the public trustee, do hereby order as follows:—

1. In this order and in the schedule hereto (unless the context otherwise requires)—

(a) Words to which a meaning is assigned by the Public Trustee Rules, 1907, shall have the same respective meanings as in those rules.

(b) Words referring to the acceptance of a trust shall be deemed to include a reference to an undertaking to administer an estate under s. 3 of the Act.

2. The Interpretation Act, 1889, applies for the purpose of the interpretation of this order as it applies for the purpose of the interpretation of an Act of Parliament.

3. Subject as hereinafter provided the fees mentioned in the schedule to this order shall be paid in respect of the duties in that schedule referred to.

4. If at any time during the continuance of a trust in course of administration by the public trustee any property (not arising from the accumulation of income of the trust property) shall become subject to the trust, in addition to the property comprised therein at the date of the acceptance thereof, there shall be paid in respect of such additional property a further fee of such amount as would have been

payable upon the acceptance of a trust comprising such additional property only.

5.—(1) Where it appears to the public trustee, upon accepting a trust, that the trust property consists wholly or partially of reversionary interests, or other property not in possession or not readily realizable (all which interests and property are in this clause referred to as "the reversionary property") he may charge an additional fee, not exceeding one pound, upon acceptance of the trust.

(2) Where such additional fee is charged, then—

(a) Upon the acceptance of the trust the reversionary property shall be excluded from the trust property for the purpose of ascertaining the amount of the fee payable in pursuance of the schedule hereto upon such acceptance, and the said fee shall be calculated and paid as if the trust property (if any) other than the reversionary property were alone comprised in the trust; and

(b) So far as regards the reversionary property, or any part thereof, the date on which the same falls into possession or is realized shall, for the purpose of ascertaining the amount of any capital fee payable in pursuance of the schedule hereto, be deemed to be the date of the acceptance of the trust, and the fee payable on such acceptance shall be payable at the first-mentioned date; and

(c) For the purpose of ascertaining the amount of the fee payable on such acceptance in respect of the reversionary property or any part thereof, the gross capital value of that property or part at the date at which such fee is payable shall be aggregated with the gross capital value of any other part of the trust property in respect of which the fee on acceptance has been previously paid.

6.—(1) In any case in which it appears to the public trustee that the circumstances of a trust or estate in course of administration, or proposed to be administered, by him are, or probably will be, such as to render his duties in relation thereto exceptionally onerous, he may, with the approval of

the Treasury, charge a special fee in respect of the performance of such duties, in addition to the fees payable in pursuance of the schedule hereto.

(2) The public trustee may make the payment of, or agreement to pay, such special fee a condition of his accepting a trust or undertaking to administer an estate.

7. In any case in which it appears to the public trustee that the circumstances of a trust or estate in course of administration, or proposed to be administered, by him are, or probably will be, such as to render his duties in relation thereto exceptionally simple, or are otherwise of an exceptional character, he may with the approval of the Treasury remit any part (not exceeding one-half) of any fee payable in respect of the performance of such duties in pursuance of the schedule hereto.

8. The public trustee may, in his discretion, upon the application of any person appearing to be interested in the capital of the trust property, commute any fee which in pursuance of the schedule hereto would, but for the commutation, become payable upon the withdrawal or distribution of the whole or any part of that capital for a certain sum to be presently paid: and for determining that sum he shall cause a present value to be set on that fee, regard being had to the circumstances and contingencies affecting the rate at which, and the occasion upon which, such fee would, but for the commutation, be payable, and interest being reckoned at 3 per cent.

9. The public trustee may, with the approval of the Treasury, agree to any mode of payment of any fee payable in pursuance of the schedule hereto which shall seem to him just and reasonable.

10. For the purposes of the schedule hereto—(a) the value of any property (other than cash) shall be the price which in the opinion of the public trustee such property would fetch if sold in the open market; and (b) income where the same is derived from the carrying on of any trade or business shall mean the gross receipts of such trade or business.

11. This order may be cited as "The Public Trustee (Fees) Order, 1907."

*Schedule.***I.—CAPITAL FEES.**

A.—*In respect of the duties of the public trustee acting in the administration of a small estate under s. 3 of the Act.*

1. Upon the acceptance of the trust—a fee at the rate of 10s. for every £100 of the gross capital value of the estate as proved for the purposes of s. 3 (1) of the Act.

2. Upon the making of an order under s. 3 (5) of the Act—a fee at the rate of 10s. for every £100 of the gross capital value of the estate at the date of the order.

3. Upon the withdrawal (whether upon distribution amongst the beneficiaries or otherwise) of any capital from the estate—a fee at the rate of 10s. for every £100 of the value of the capital withdrawn.

B.—*In respect of the duties of the public trustee acting as ordinary trustee or executor or administrator (except in cases provided for under heads A or D).*

1. Upon the acceptance of the trust—a fee at the following rates :—

(a) if the gross capital value of the trust property at the date of such acceptance does not exceed £1,000—15s. per cent. in respect of that value ; and

(b) if such gross capital value at the said date exceeds £1,000 then—

15s. per cent. in respect of that value up to £1,000.

5s. 0d. per cent. in respect of any excess of that value over £1,000 up to £20,000.

2s. 6d. per cent. in respect of any excess of that value over £20,000 up to £50,000.

1s. 3d. per cent. in respect of any excess of that value over £50,000.

2. Upon the withdrawal (whether upon distribution amongst the beneficiaries or otherwise) of any capital from the trust property—a fee at a rate, for every £100 or part of

£100, of the value of the property withdrawn, equal to the rate per cent. at which the fee upon the acceptance of the trust was payable in respect of the entire trust property.

8. Provided that the fees chargeable under the two preceding clauses of this head shall be so regulated that the total fees so chargeable in respect of a trust shall not be less than £5.

C.—In respect of the duties of the public trustee acting as custodian trustee only (except in cases provided for under head D).

Upon any occasion mentioned under head B, one half of the fee payable under that head upon that occasion.

D.—In respect of the duties of the public trustee acting as ordinary trustee, or custodian trustee, in respect of land not subject to a trust for conversion.

1. Upon acceptance of the trust—a fee of £5.

2. Upon raising any money under any trust or power in the trust instrument—a fee at the rate of 2s. 6d. for every £100 so raised. Minimum fee £1.

3. Upon the withdrawal from the trust property (whether upon transfer to or distribution amongst the beneficiaries or otherwise) of the land, or the moneys or property representing the land, or any part thereof respectively—

(a) When the public trustee is acting as ordinary trustee a fee at a rate, for every £100, or part of £100, of the value of the property withdrawn, equal to the rate per cent. at which, in pursuance of clause 1 of head B, the fee would be payable if such withdrawal were an acceptance of a trust chargeable under that head and comprising only the property withdrawn: and

(b) When the public trustee is acting as custodian trustee only, one half of the fee payable under paragraph (a) of this clause—

Provided that a re-settlement of property subject to a strict settlement shall not be deemed to be a withdrawal within the meaning of this clause.

II.—INVESTMENT FEES.

In respect of the duties of the public trustee acting as ordinary trustee or executor or administrator or custodian trustee or in the administration of a small estate under s. 8 of the Act.

1. Upon any investment (other than a purchase of land, or any mortgage of, or charge on, property)—a fee at the rate of 10s. for every £100 invested (such fee to include any sum paid by the public trustee for brokerage).

2. Upon any purchase or sale of land, or any investment by way of mortgage of, or charge on, property—a fee at the rate of 2s. 6d. for every £100 of the purchase money or money advanced.

III.—INCOME FEES.

In respect of the duties of the public trustee acting in any of the capacities mentioned under Division II.

Upon the annual income of the trust property—a fee at the rate of £2 per cent. in respect of that income up to £500, and at the rate of £1 per cent. in respect of any excess of that income over £500. Provided as follows:—

- (a) where income is paid direct to the person entitled, or to his bank, or is collected by such person, the income fee shall not be charged in respect of that income at a higher rate than £1 per cent.; and
- (b) except where the public trustee is acting in the administration of a small estate under s. 8 of the Act the minimum income fee shall be 10s. 6d.

IV.—AUDIT FEES.

In respect of the duties of the public trustee under s. 13 of the Act.

Upon the performance of any duty under that section, such fee, not being less than 5s. or more than £5, as the public

EXECUTORS.

trustee shall determine in each particular case, regard being had to the time and trouble involved, the value of the estate and the other circumstances of the case.

H. H. Asquith.
Joseph A. Pease.

Loreburn, C.

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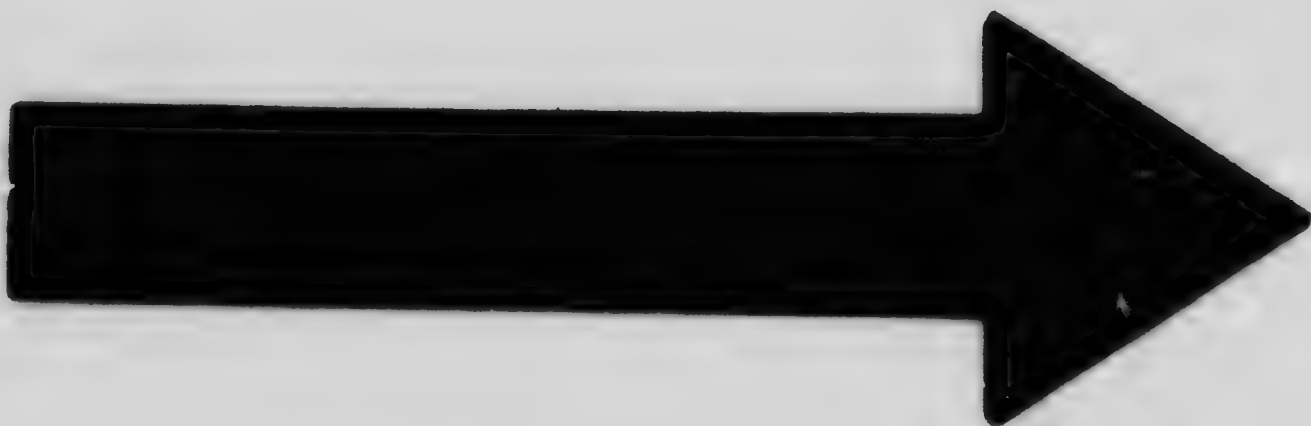
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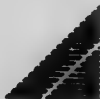
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